93 - 529

No.

Supreme Court, U.S.
FILED
MAY 26 1993
OFFICE OF THE CLERK

In The Supreme Court of the United States
October Term,

LAWLINE, *et al.*
Petitioners

V.

AMERICAN BAR ASSOCIATION, *et al.*
Respondents

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER GOVERNMENTAL RULES PROHIBITING LAWYERS FROM PRACTICING LAW IN MULTIPROFESSIONAL PARTNERSHIP WITH NON-LAWYERS, AND FROM PRACTICING LAW IN THE CORPORATE FORMAT, IF ANY NON-LAWYERS ARE STOCKHOLDERS, VIOLATES THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH, AND ASSOCIATION, AND INHIBITS ACCESS TO THE COURTS? 3

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IV. WHETHER THE DRAFTING AND DISTRIBUTION BY THE PRIVATE ASSOCIATION DEFENDANTS OF THE ETHICS OPINIONS THAT STATE THAT IT IS UNETHICAL FOR LAWYERS TO PRACTICE LAW IN MULTIPROFESSIONAL PARTNERSHIP WITH NON-LAWYERS, AND THAT IT IS UNETHICAL TO PRACTICE LAW IN THE CORPORATE FORMAT, IF ANY NON-LAWYERS ARE STOCKHOLDERS, ARE EXEMPT ACTS UNDER THE NOERR-PENNINGTON DOCTRINE? 15

V. WHETHER THE ACTS OF THE PRIVATE ASSOCIATION DEFENDANTS TO RESTRICT COMPETITION FROM LAWYERS WHO WOULD PRACTICE LAW IN BUSINESS FORMATS IN WHICH NON-LAWYERS COULD BE STOCKHOLDERS AND/OR PARTNERS, ARE PART OF AN "ON GOING CONSPIRACY AND GROUP BOYCOTT" IN VIOLATION OF THE SHERMAN ACT? 19

VI. WHETHER THE DRAFTING AND DISTRIBUTION OF THE ETHICS OPINIONS AND STATEMENTS OF PRINCIPLES BY THE PRIVATE ASSOCIATION DEFENDANTS ARE EXEMPT ACTIONS UNDER THE DOCTRINE OF *PARKER V. BROWN*? 20

VII. WHETHER THE DISTRICT COURT ERRONEOUSLY HELD THAT THE PRIVATE ASSOCIATION DEFENDANTS DID NOT ACT UNDER COLOR OF LAW TO DEPRIVE THE PLAINTIFFS OF RIGHTS SECURED BY THE "CONSTITUTION AND LAWS" OF THE UNITED STATES IN VIOLATION OF 42 U.S.C. 1983? 21

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PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

LAWLINE, et al., the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on February 25, 1992.

OPINIONS

On May 24, 1990, Judge James F. Holderman, United States District Court for the Northern District of Illinois, Eastern Division, granted defendants' motion to dismiss, and entered a memorandum opinion and order dismissing the complaint under F.R.Civ. Proc. 12(b)(6) for failure to state a claim.

On February 25, 1992 the United States Court of Appeals for the Seventh Circuit, Justices Cummings, Ripple, and Reynolds, affirmed the judgment of the District Court, No. 90-2571. A copy of this decision is attached as Appendix 1.

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court was invoked pursuant to the Sherman Anti-Trust Act, 15 U.S.C. Section 1 and 2; Sections 14 and 16 of the Clayton Act, 15 U.S.C. Chapter 15 and 26; Section 1983 of the Civil Rights Act of 1871, as amended, 42 U.S.C. Sections 2201-2202; and federal question jurisdiction as provided by 28 U.S.C. 1331.

Jurisdiction of the United States Court of Appeals for the Seventh Circuit was invoked pursuant to Title 28 U.S.C. Section 1291.

Jurisdiction of this Court is invoked pursuant to 15 U.S.C. Section 29; 28 U.S.C. Section 1251 (1) and, the considerations governing review on writ of certiorari under Rule 10.1 (c)

indicating the chararacter of reasons this Court will consider, i.e. because the United States Court of Appeals for the Seventh Circuit decided an important question of federal law in a way that conflicts with applicable decisions of this Court.

QUESTIONS PRESENTED

I. WHETHER GOVERNMENTAL RULES PROHIBITING LAWYERS FROM PRACTICING LAW IN MULTIPROFESSIONAL PARTNERSHIP WITH NON-LAWYERS, AND FROM PRACTICING LAW IN THE CORPORATE FORMAT, IF ANY NON-LAWYERS ARE STOCKHOLDERS, VIOLATES THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH, AND ASSOCIATION, AND INHIBITS ACCESS TO THE COURTS? 3

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STATUTES INVOLVED

This case involves the following constitutional and statutory provisions.

U.S.C. Amend. 1
U.S.C. Amend. 14
28 U.S.C. Section 1331
15 U.S.C. Section 15
15 U.S.C. Section 1
15 U.S.C. Section 2
15 U.S.C. Section 26
42 U.S.C. Section 1983
28 U.S.C.R. 12(b)(6)

STATEMENT OF CASE

Lawline, is an unincorporated association of lawyers, paralegals, and laypersons, designed to answer legal questions for the public without charge over the telephone, to refer members of the public without financial resources to agencies providing legal services, and to refer members of the public who do not qualify for free legal services to attorneys charging reduced fees. (App.1,p.3) Thomas Holstein is an Illinois lawyer and the managing director and supervising attorney of Lawline. LeNore Nelson, a paralegal, serves as Lawline's office manager. Joyce Novak is a resident of the city of Chicago who received information from Lawline regarding Chapter 7 bankruptcy proceedings. (App.1,p.3)

In 1988 charges alleging that Lawline, Holstein and Nelson were engaged in "the unauthorized practice of law" were initiated by the Illinois Attorney Registration and Disciplinary Commission and by the Office of the United States Trustee for the Northern District of Illinois. (App.1,p.4-5) These charges were dismissed after this case was filed, and before the issuance of the decision of the District Court on May 24, 1990. (App.1,p.5,n.2)

Plaintiffs' first amended complaint names as defendants the American Bar Association, the Illinois State Bar Association, the Chicago Bar Association, the Justices of the Illinois Supreme Court, the members of its Committee on Professional Responsibility, the members of its Attorney Registration and Disciplinary Commission, the United States Trustee for the Northern District of Illinois, the United States Trustee's Assistant, and five members of the executive committee of the United States District Court for the Northern District of Illinois. (App.1,p.3-4)

Plaintiffs challenge the provisions of ABA Model Rule 5.4(b), and 5.5(b) as proposed for adoption by the Illinois Supreme Court in 1987, and as effective on August 1, 1990 by order of the Illinois Supreme Court. (App.1,p.1-2)

Rule 5.4 prohibits licensed lawyers from practicing law under any business format which would include as partners other non-lawyer professionals, such as Certified Public Accountants, architects, engineers, real estate brokers and psychologists. Rule 5.4 also prohibits licensed lawyers from practicing law in any corporate business format in which non-lawyers could be stockholders. Rule 5.4 further labels any licensed lawyer who practices law under such business formats as engaged in the "unauthorized practice of law." (App.1,p.2; App.3)

Rule 5.5(b) prohibits licensed lawyers from assisting any person in performance of any activity which constitutes the "unauthorized practice of law." (App.1,p.2; App.3)

The plaintiffs' further challenge similiar prohibitions provided in Rule 3-103 of the ABA Code of 1969, as adopted by the Executive Committee of the District Court for the Northern District of Illinois. On October 19, 1990, subsequent to the filing of the instant case, the Northern District adopted ABA Model Rules 5.4 and 5.5 which contain the above prohibition. Plaintiffs challenge the defendants' promulgation, adoption, and enforcement of these Rules as violative of the Sherman Antitrust Act and of plaintiffs' constitutional rights to freedom of speech, association, and access to the courts under the First Amendment to the United States Constitution, as well as their rights of due process and equal protection under the 1871 Civil Rights Act.

Plaintiffs sought a declaratory judgment that the specific rules in issue are unconstitutional on their face.

Jurisdiction was invoked pursuant to the Sherman Anti-Trust Act, 15 U.S.C. Section 1 and 2; Sections 14 and 16 of the Clayton Act, 15 U.S.C. Chapter 15 and 26; Section 1983 of the Civil Rights Act of 1871, as amended, 42 U.S.C. Sections 2201-2202; and federal question jurisdiction as provided by 28 U.S.C. 1331.

On May 24, 1990 the District Court For the Northern District of Illinois pursuant to Federal Rule of Procedure 12(b)(6) granted the defendants' motion to dismiss for failure to state a claim.

On February 25, 1992, The Seventh Circuit Court of Appeals issued an opinion affirming the District Court.

ARGUMENT

I. GOVERNMENTAL RULES PROHIBITING LAWYERS FROM FORMING PARTNERSHIPS WITH NON-LAWYERS AS THE UNAUTHORIZED PRACTICE OF LAW VIOLATE THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH AND ASSOCIATION.

The majority of LAWLINE'S activities consist of engaging in speech of an informative and educational nature through the use of telephonic communications (i.e. answering legal questions by telephone without charge) (Complaint, paragraph 30). This information is conveyed by licensed lawyers and paralegals who answer questions under direct lawyer supervision.

The right to disseminate and receive informational and educational speech of the nature conveyed by LAWLINE has long been protected by the Supreme Court under the First and Fourteenth Amendments. See *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972); *Lamont v. Postmaster General*, 361 U.S. 398 (1965); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Martin v. Struthers*, 319 U.S. 141 (1943); *Griswold v. State of Connecticut*, 381 U.S. 479, 482-483 (1965).

Freedom of association between lawyers and non-lawyers to obtain meaningful access to the courts has long been recognized by the Supreme Court, and is recognized as a fundamental First Amendment freedom. See: *NAACP v. Button*, 371 U.S. 415 (1963), *Brotherhood of Railroad Trainmen v. Virginia Ex Rel. Virginia State Bar*, 377 U.S. 1 (1964), *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967).

Additionally, the Supreme Court in *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971), protected the fundamental freedom of licensed lawyers to form business associations with non-lawyers, without requiring that an impact on any suspect class be shown. This Court stated that:

> "The common thread running through our decisions ... is that collective activity undertaken to obtain

> meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. State Bar of Michigan*, 401 U.S. at 585-586."

This line of Supreme Court precedent coincides with the traditional understanding that freedom of association provides "a right to join with others to pursue goals independently protected by the first amendment." Laurence Tribe, *American Constitutional Law*, 1013 (2nd ed. 1988). The goal in the instant case is to assist the public in gaining access to the courts by developing the most cost efficient legal delivery systems. This development is artifically restricted in the private sector by requiring all stockholders in law firms to be lawyers.

The absolute prohibition of lawyer/non-lawyer partnerships, in which licensed lawyers would retain exclusive management control over legal matters, infringes on the fundamental First Amendment right of association between lawyers and non-lawyers to facilitate access to the courts. This prohibition artificially limits the ability of licensed lawyers to raise the capital necessary to develop potentially more efficient business organizations for the delivery of legal information and advice than the traditional law firm format because it forbids non-lawyers from holding stock in a corporation which would practice law.

Whether a non-lawyer owns an equity interest in the business entity which employs the lawyer, it is still the licensed lawyer who is practicing law. This prohibition does not have any bearing on the quality of legal services, and such lawyer/non-lawyer relationships do not constitute any inherent harm to the public from the "unauthorized practice of law." *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 221-222, 225 (1967); Cf. *American Medical Association v. F.T.C.*, 638 F. 2d 443, 449-450 (2d Cir. 1980), aff'd 455 U.S. 676 (1982), 94 F.T.C. 701 (1979) (opinion of commission); for a detailed review of pertinent cases, See, 94 F.T.C. at 909, 974, and 1017-1018 (identical prohibition restraining licensed physicians from practicing medicine in such multidisciplinary practices in which non-physicians would own an interest).

In *United Mine Workers v. Illinois State Bar Association*, supra, the Supreme Court rejected the Illinois State Bar Association's argument that allowing a union to employ a lawyer would lead to "baseless litigation and conflicting interests between the association and individual litigants." 389 U.S. at 223. These rejected ISBA accusations were made in reliance upon the ABA Standing Committee on Ethics, Informal Opinion No. 469 (issued 12/26/61), Opinion No. A of 1950, and upon Canons 35 and 47 of the ABA and ISBA, which classified such association as the unauthorized practice of law by a "lay agency." 389 U.S. at 225 n.6; 389 U.S. at 226 n. 1; and 389 U.S. at 232 n.15. The same Canons which the Supreme Court rejected in *Mine Workers* evolved into the provisions of the ABA Model Code of 1969 and of the ABA Model Code of 1983 which are challenged herein. Cf. *Leoris v. Dicks*, 150 Ill. App. 3d 350, 103 Ill. Dec. 584, 501 N.E.2d 901,904 (1st Dist. 1986). The defendants arguments in this case are the same that this Court rejected in *Mine Workers*.

The District Court in this case mischaracterized the issue. (App. 2,p.17) The plaintiffs have not sought to "secure redress of grievances in Court by unlicensed counsel" as that court implied in its reliance upon *Turner v. American Bar Association*, 407 F. Supp. 451 (N.D. Tex. 1975). The plaintiffs do not challenge the state's right to restrict the practice of law to qualified individuals, or the state's right to limit the practice of law to individuals who are licensed lawyers. The plaintiffs challenge the state's right to prohibit licensed lawyers from performing the acts which they are licensed to do solely because these acts are done while they are employees of corporations with non-lawyer shareholders or, when they are done as a partner in a multi-professional partnership with other licensed professionals who are non-lawyers.

The Seventh Circuit Court of Appeals erroneously determined that no fundamental right was at issue in this case because the plaintiff had not shown that lay persons were deprived of meaningful access to the courts because lawyers cannot form partnerships with nonlawyers. (App.1,p.15.) For this reason, the Seventh Circuit held that the heightened scrutiny of the state's justification necessitated by *Mine Workers* was not triggered.

(App.1, p. 15). The Seventh Circuit made a reversible error in sustaining the dismissal of the plaintiff's complaint on this basis.

The degree of interference with the public's access to the courts which is created by the challenged prohibition, and its effect on restricting competition and raising capital to fund potentially more efficient and cost effective legal information delivery systems, are questions of fact which inherently implicate fundamental first amendment rights. These are questions of fact which rely on statistical data and expert sociological studies for proof. It is not a basis to sustain the dismissal of the plaintiffs suit for failure to state a claim. There is nothing "abstract" in licensed lawyers seeking to gain access to conventional methods of corporate financing, such as the issuance of stock to non-lawyers, as a means of funding more cost efficient legal delivery systems which would compete with conventional law firms. (App.1,p. 14). The fundamental first amendment freedoms of speech and association are inherently implicated as they were in *Mine Workers*.

Contrary to the Seventh Circuit's finding that the unauthorized practice of law rule had not been applied to the plaintiffs' conduct, (App.1,p.5,n.2), this case arose when the U.S. Trustee moved in the bankruptcy court for an order requiring LAWLINE to disgorge a fee purportedly received for the unauthorized practice of law, and to enjoin LAWLINE from further bankruptcy practice, because a LAWLINE attorney and the paralegal under his direct supervision, taught a consumer how to prepare her Chapter 7 bankruptcy petition. (App.1,p.3 & 5)

The district and the appellate courts erroneously applied the rational basis test in evaluating the state and federal absolute prohibitions in issue. When the regulations classify in such a way as to infringe upon constitutionally protected fundamental freedoms, as in the instant case, then heightened scrutiny under the Equal Protection Clause is required. See, e.g. *City of Cleburne*, 473 U.S. at 440; *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 906-907 n.6. (1986). Such a regulation can be upheld only if the restrictions are no greater than is essential to further the government interest concerned. *United States v. O'Brien*, 391 U.S. 367, 377, 20 L. Ed 2d 672, 680, 88 S.Ct. 1673 (1968).

In all such cases then the Equal Protection Clause requires that statutes be narrowly drafted to directly further a legitimate governmental purpose. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 101, 92 S. Ct. 2268, 33 L. Ed. 2d 212, 220 (1972); *Williams v. Rhodes*, 393 U.S. 23, 29, 21 L. Ed.2d 24,30, 89 S.Ct. 5 (1968). The governmental purpose cannot be pursued by regulations that broadly stifle fundamental First Amendment freedoms when the end can be achieved by a more narrowly drafted regulation. *Chicago v. Mosley*, 408 U.S. at 101 n. 8. (citing seven (7) Supreme Court cases in support of this analysis and application to similar fact situations).

The challenged rules are greater than essential to protect the public from any speculative harm of conflict of interest or client loyalty which might arise from lawyers practicing law in multidisciplinary firms. This overbreadth is demonstrated by Illinois Rules 2-106 (a), 2-109(b), 5-101(a), (b), (c), (d)(3), and 7-1-1(a)(1), that specifically address attorney-client loyalty and conflict of interest, and by ABA Model Rules 7.2, 7.3, 1.2, 1.3, 1.4(b), 1.5, 1.6, 1.7(b), 3.2, and 5.4(c) and (d)(3). In *Wilk v. American Medical Association*, 719 F.2d 207 (7th Cir. 1983), on remand 671 F.Supp. 1465 (1987), the Seventh Circuit Court of Appeals determined that an ethical opinion of the AMA which prohibited doctors from forming business associations with chiropractors was anticompetitive and overbroad because the objective of protecting the public from low quality medical care could have been "adequately satisfied in a manner less restrictive of competition." *Wilk*, 719 F. 2d at 227; Accord, *Kruezer v. American Academy of Periodonotology*, 735 F.2d 1479, 1493-1494 (D.C. Cir. 1984), citing *Wilk*, 719 F. 2d at 225-227. In *American Medical Association v. F.T.C.*, 638 F. 2d 443, (2d Cir. 1980), aff'd 455 U.S. 676 (1982), 94 F.T.C. 701 (1979) (opinion of commission), a regulation which prohibited physicians from practicing medicine in multidisciplinary firms in which non-physicians owned an equity interest was stricken because the prohibition was greater than essential to protect the public from any speculative harm of low quality medical services which might be rendered by physicians working as partners or employees within

such business formats. *AMA*, 638 F. 2d at 449-450, for detailed review see 94 F.T.C. at 909, 974, and 1017-1018.

The standard which the defendants should have embodied in their rules if their true concern was protecting the public from the influence of non-lawyer stockholders in a law firm is defined in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564-567 (1980), where the Supreme Court formulated a similar standard to strike overbroad restrictions in commercial speech cases. The "Central Hudson" test was subsequently applied to strike the use of overbroad prohibitions to regulate attorney conduct in the case of *In re R.M.J.*, 455 U.S. 191 (1982), and in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). As the Court stated in *Zauderer*:

> "the burden is on the State to present a substantial governmental interest justifying the restriction as applied to the appellant and to demonstrate that the restriction vindicates that interest through the least restrictive means.' Id. at 647; Accord, *Shapero v. Kentucky Bar Association*, 486 U.S. ____, 100 L.Ed. 2d 475, 486 (1988)."

Therefore, broad rules framed to purportedly protect the public, as in the instant case, violate the fundamental freedoms of speech and association, and inhibit access to the courts. *United Transportation*, supra, at 580-581; *Mine Workers*, supra, 389 U.S. at 222. Cf. *Haklin v. Arizona*, 389 U.S. 143, 151 n. 11. (1967) (dissent of Justice Douglas warning against use of overbroad U.P.L. statutes to attack licensed lawyers who espouse unpopular causes). As succinctly put by the late Justice Douglas in his dissent in *Haklin*:

> "The so-called 'legal' problem of the poor is often an unidentified strand in a complex of social, economic, psychological, and psychiatric problems. Identification of the 'legal' problem at times is for the expert. But even a 'lay' person can often perform that function and mark the path that leads to the school board, the school principal the welfare agency, the Veterans Administration, the police review board, or the urban renewal agency...

"Broadly phrased unauthorized-practice-of-law statutes such as that at issue here could make criminal many of the activities regularly done by social workers, who assist the poor in obtaining welfare and attempt to help them solve domestic problems." Id. 389 U.S. at 146-151.

II. THE TERM, "UNAUTHORIZED PRACTICE OF LAW," AS USED IN RULES 5.4 AND 5.5 IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS APPLIED TO THE PLAINTIFFS.

The challenged regulations further infringe upon the plaintiffs' fundamental First Amendment freedoms of speech and association, and further impede public access to the courts, because the term "practice of law," and "unauthorized practice of law" as used on the face of the rules in issue, and as applied in the instant case, fail to give notice of the activities proscribed. They also fail to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 1, 8 (1987); See also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

This vagueness allowed state and federal employees to arbitrarily charge LAWLINE's lawyers with the unauthorized practice of law for performing acts which they are licensed by the state to do, such as assisting consumers to prepare *pro se* bankruptcies. (App.1, p.3 & 4). The Seventh Circuit was incorrect when the Court disposed of the plaintiffs' vagueness challenge simply because the charges which were initiated prior to the filing of this case did not result in sanctions against the plaintiffs, and because the plaintiffs in their pleading deny "that any non-lawyers at LAWLINE have given legal advise without supervision by licensed attorneys." (App.1, p. 5, n.2). The dismissal of the charges against the plaintiffs while this matter was pending and the state defendants' self-serving admission at the oral argument that the plaintiff's conduct was not prohibited, does not render the constitutional issues moot.

III. THE DEFENDANT'S ACTS IN ADOPTING ABA MODEL RULE 5.4 AT THE ABA MEETING WHICH WAS HELD ON FEBRUARY 8, 1983, AND THE ACTS LOBBYING OTHER ABA DELEGATES FOR PASSAGE OF ABA MODEL RULE 5.4 ARE NOT EXEMPT ACTS UNDER THE NOERR-PENNINGTON DOCTRINE.

Anticompetitive acts which are "directed toward obtaining governmental action," *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 139 U.S. 127, 140 (1961), have traditionally been exempt from antitrust enforcement because such acts are protected under the fundamental First Amendment freedoms of association and petition. *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. ___, 107 L.Ed. 2d 851, 867, 110 S.Ct. ___ (1990); *Noerr*, 139 U.S. at 139-140.

The *Noerr* exemption, however, does not extend to "every concerted effort that is genuinely intended to influence governmental action." *Trial Lawyers*, 107 L. Ed. 2d at 867, citing *Allied Tube and Conduit Corporation v. Indian Head Inc.*, 486 U. S. 492, 503 (1988). In *Allied Tube* the Court held that the traditional Noerr exemption does not extend to a boycott conducted by business competitors who "stand to profit financially from a lessening of competition in the boycotted market." *Trial Lawyers*, 107 L.Ed.2d at 868, summarizing application of *Noerr* exemption as applied in *Allied Tube*, 486 U.S. at 508.

On February 8, 1983, the ABA House of Delegates, including delegates from each of the defendant associations, rejected Draft Rule 5.4, as proposed for passage by the ABA Kutek Commisssion after several years of study, and adopted present Model Rule 5.4, which included the blanket prohibition of lawyer/non-lawyer partnerships that is in issue in this case. Draft Rule 5.4, which was rejected by the House of Delegates, would have authorized licensed lawyers to practice law as employees of corporations in which non-lawyers could be stockholders, and also would have authorized licensed lawyers to practice law in multi-professional partnerships which would include non-lawyers. The plaintiffs in their complaint allege several acts of the association-defendants which were designed to defeat passage of Draft Rule 5.4, and

to pass the blanket prohibition provided in Model Rule 5.4. These specific acts were designed by decision makers with an economic interest in restricting competition to defeat the authorization Draft Rule 5.4. These acts to restrict competition were not exempt under *Noerr-Pennington* because they were directed toward association members who are licensed lawyers (Complaint, para. 234), and were not directed to any state or federal court to obtain governmental action.

The defendants did not begin to direct their acts at governmental bodies to obtain govermental action until after Kutek Draft Rule 5.4 was defeated and the blanket prohibition of 5.4 was firmly in place. The plaintiffs allege that the private association defendants, through these acts, created a group boycott (Complaint, para. 249-252) of licensed lawyers who would practice law in multi-disciplinary firms in which non-lawyer professionals could own an equity interest and that this boycott was enforced through peer pressure. (Complaint, para. 220). The comments of the chief spokesperson for the ABA Section which co-ordinated the efforts to defeat Kutek Draft 5.4, and which proposed the prohibition in Rule 5.4, clearly demonstrate that the primary concern of the HOD members, who opposed authorizing the practice of law by licensed lawyers in such business formats, was the fear of competition, and the fear of the reduced income which would result from this competition:

> "You each have a constituency. How will you explain to the sole practitioner who finds himself in competition with Sears why you voted for this? How will you explain to the man in the mid-sized firm who is being put out of business by the big eight law firm?"
> HOD trans., Appendix 3, p. 48; See also AC, para. 95.

> "I suggest to you that that's a breach of the golden rule. The one who has the gold makes the rules, and the one who has the gold under existing Rule 5.4 is going to be a non-lawyer..."
> HOD trans. Appendix 3, p. 38; See also AC, para. 96.

The economic self-interest to restrict competition by the decision makers who orchestrated the defeat of Kutek Draft 5.4 and the adoption of Model Rule 5.4 brings the present case squarely within the scope of the *Allied Tube* exception to the *Noerr-Pennington* doctrine. As stated by this Court in *Allied Tube:*

> "our holding is expressly limited to cases where an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants." *Allied Tube v. Indian Head, Inc.*, 486 U.S., at 509, and 510, n.13.

The fact pattern in the instant case is strikingly similar to the facts in *Allied Tube*. First, each case focuses on a standard of a private association that sets and publishes standards. *Allied*, 486 U.S. at 495. Second, state governments routinely adopt the standards set by each association with little or no change in the association's standards. *Allied*, supra at 495. Third, in each case a bona fide "professional panel" of the association proposed a standard which was recommended by "objective experts." *Allied*, supra at 495, 496, 476, and 510, n.13. Fourth, in each case decisionmakers who had an economic interest in restricting competition from the competitive source which was authorized by the proposed standard, met, communicated, and "planned strategy" to co-ordinate the defeat of the standard which was proposed by the objective experts." *Allied*, supra, at 496, and at 510, n.13. Fifth, in each case the proposal was rejected by majority vote at the association meeting, and a blanket prohibition which had an adverse impact on competition, was adopted in place of the proposed authorization. *Allied*, supra, at 497-498. Sixth, in each case there was a genuine intent by the defendents to directly influence the members of an association and to indirectly influence governmental action only after inserting the prohibition in the association's standards. *Allied*, supra 499, 503. Seventh, in both cases the defendants were "at least partially motivated by the desire to lessen competition," and stood to reap substantial economic benefits from a standard which prohibited the source of competition.

In *Allied Tube* this Court specifically rejected the defendant's argument, that their acts were exempt because the standard was routinely enacted into law by several states and municipalities. However, this is the same argument made by the private defendants in the instant case and relied upon by both the District Court and the Seventh Circuit. (App 1,p.7) This is reversible error. In the instant case, as in *Allied Tube*, the "predictable adoption of the Code into law by a large number of state and local governments" could be foreseen at the time the prohibition was adopted. See *Allied Tube*, supra, at pp. 500 and 502. The basis relied upon by both lower courts is contrary to *Allied Tube*. The Supreme Court in *Allied Tube* would have reached the opposite result if it applied the rationale used by the lower courts in the present case. The acts of the private association defendants, which were directed at other delegates to defeat Kutek Draft 5.4 and to insure passage of the prohibition of Model Rule 5.4, were not acts of petition "directed toward obtaining governmental action." They were acts of "commercial activity with political impact," as the acts were in *Allied Tube*, supra at p. 507, and they are not protected.

Noerr immunity was designed to protect the promulgation of standards when they are based on the "merits of objective expert judgments." Immunity was not designed to protect the promulgation of standards when they are made through a standard-setting process that is biased by members who have economic interests in stifling competition. This doctrine does not protect purely private actions when these concerted acts were not genuinely directed toward prompting governmental action. See *Allied Tube*, supra, at 476 and 503; *Wilk v. American Medical Association*, 895 F.2d 252, 257 (7th Cir. 1990), *rehearing denied, cert. denied*, 110 S.Ct. 2621 (1990), *rehearing denied* 111 S.Ct. 6 (1990).

The plaintiffs in their complaint alleged sufficient facts to demonstrate bias in the decisionmaking process. These facts are taken as true for purposes of evaluating the motion to dismiss. These facts include but are not limited to the following allegations:

(1) The ABA Kutek Commission, after five years of study, proposed a draft of ABA Rule 5.4 which authorized licensed lawyers to practice law in multidisciplinary practices in which non-lawyers could own an equity interest (Complaint, para. 74-80).

(2) This draft was based upon the Supreme Court decisions in "*Button, Trainmen*, and *Mine Workers*," (App 3, pp. 44-45) (floor debate HOD trans., 2/8/83), and was presented for adoption to the ABA House of Delegates at the ABA meeting on February 8, 1983 (Complaint, para. 81).

(3) Prior to this meeting, the ABA Section on General Practice co-ordinated efforts to defeat the adoption of draft Rule 5.4 (Complaint, para. 94).

(4) The ABA Section on General Practice was composed of delegates from small law firms, and the economic interest of these small firms would have been the most adversely affected by allowing lawyers to practice law in multidisciplinary firms in which non-lawyers could own an equity interest (Complaint, para. 88). (App. 3, HOD trans, pp. 37-40, pp. 48-49).

(5) At the ABA/HOD meeting on February 8, 1983, this group of delegates defeated draft Rule 5.4 and replaced the proposed authorization of multiprofessional practices with the prohibition in Model Rule 5.4(b) (Complaint, para. 81).

(6) Each of the private association defendants participated in the conspiracy to defeat proposed Rule 5.4. and to its replacement by the prohibition of current Model Rule 5.4. (Complaint, para. 44-45,70-71, and 74-89, and 94; and App.3, HOD trans, pp 37-40, pp. 48-49).

The ABA Rule making process lacked sufficient safeguards to prevent bias by decisionmakers with economic self-interest in restricting competition from lawyers who would practice law in multidisciplinary firms in which non-lawyers could own an equity interest (Complaint, para. 70, 71, and 81-88). This bias resulted in the adoption of an overbroad regulation which constitutes an unlawful restraint of trade when we apply the test established

in *Wilk v. American Medical Association*, 719 F.2d 207, 227-230 (7th Cir.1983); Accord, *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1493-1494 (D.C.Cir. 1984).

IV. THE DRAFTING AND DISTRIBUTION OF THE ETHICS OPINIONS IN ISSUE BY THE PRIVATE ASSOCIATION DEFENDANTS WERE NOT EXEMPT ACTS UNDER THE NOERR-PENNINGTON DOCTRINE.

There is a presumption against any implied exclusion from the antitrust acts. *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 398 (1978). The private association defendants may rebut this presumption under the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine does not protect purely private actions such as the drafting and distribution of these ethics opinions, when these acts were not genuinely directed toward prompting governmental action. See *Allied Tube*, supra, at 476 and 503; *Wilk v. American Medical Association*, 895 F.2d 252, 257 (7th Cir. 1990), *rehearing denied*, *cert. denied*, 110 S. Ct. 2621 (1990), *rehearing denied* 111 S.Ct. 6 (1990).

The defendants deny that these opinions have any effect of their own force. However, the coersive market power and effect of peer pressure has long been recognized by the Supreme Court since no lawyer desires to be branded as unethical by his peers. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, at 791 n.21 (1975); *Wilk v. AMA*, 671 F.Supp, at 1470, 719 F.2d, at 230; *AMA v. FTC*, 638 F. 21d, at 440-450; *Kreuezer v. American Academy of Periodontology*, 735 F. 2d 1479, 1494-1496 (D.C. Cir. 1984); *Surety Title Ins. Agency v. Virginia State Bar*, 431 F.Supp. 205, 206-208 (E.D.Va. 1977), remanded on other grounds to await Virginia Supreme Court action, 571 F.2d 205, 206-208 (4th Cir.1978).

This peer standard of absolute prohibition is overbroad, and constituted an unlawful restraint of trade when we apply the test established by the Courts in *Wilk v. American Medical Association*, 719 F.2d 207, 227-230 (7th Cir.1983); Accord, *Kreuzer v. American*

Academy of Periodontology, 735 F.2d 1479, 1493-1494 (D.C.Cir. 1984). The market power of the ABA, and its delegates, is sufficient of its own force to dictate the uniform national standard of lawyer conduct embodied in the ethics opinions, Model Rules, Model Code, and other statements of principles and reports, irrespective of their adoption by any state or federal court (Complaint, para. 223). The uniform adoption of the ABA Model Rules by twenty-six (26) states between August 1983 and February 15, 1988, demonstrates that the ABA Model Rules of 1983 are the exclusive source for state rules (Complaint, para. 101, 176), and indicate a pattern similar to the prior anticompetitive activities of the ABA which were alleged by the Justice Department to be in violation of Section 1 of the Sherman Act in *United States v. American Bar Association*, unreported, 76 C 3475 (N.D.I11.1976), regarding the uniform adoption by states of the ABA Model Code of 1969.

The Third Circuit Court of Appeals in the case of *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 160 (3d Cir.1984), recognized the fact that the ABA ethics opinions, statements of principles and rules set the national standard for lawyers "of its own force" when the court stated that:

> "We believe that the appropriate guidance for finding the current national standards of ethical norms lies in the standards promulgated by the American Bar Association. Cf. *Strickland v. Washington*, 466 U.S. 688 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) (looking to ABA standards in determining prevailing norms of practice for sixth amendment claim)."

The Supreme Court in *Strickland*, looked to the ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed 1980) to determine the "Prevailing norms of practice as reflected in American Bar Association standards and the like," *Strickland v. Washington*, 466 U. S. 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984), and not to the Model Rules or Model Code as adopted by any state or federal court. The ABA Standards for Criminal Justice, like the ethics opinions in issue, have not been adopted by any state or federal court and, as demonstrated in *Strickland* and *Corn*

Derivatives, have effects of their own force separate and apart from the Model Rules or Model Code as adopted by any state or federal court.

Although the Illinois Supreme Court and the District Court "exercise exclusive power to regulate and discipline attorney 'conduct,'" this does not support the lower courts' erroneous conclusion that, "Therefore, any ethics opinions issued by the private associations could not have had any cognizable anticompetitive effects after 1982." The ABA House of Delegates adopted Model Rule 5.4(b) and Rule 5.5(b) in 1983.

Plaintiffs allege that the adoption of the two ethics rules at issue was the result of a conspiracy among the ABA House of Delegates, ISBA delegates, and CBA delegates to protect traditional law firms and restrains trade. In pursuance of the conspiracy the defendants allegedly agreed to have the three bar associations issue advisory ethics opinions prohibiting non-lawyers from owning financial interests in law firms and prohibiting lawyers from forming partnerships with non-lawyers if any of the activities of the partnership consist of the practice of law. The Supreme Court of Illinois, and the federal courts, have traditionally looked to the ABA ethics opinions and to the ABA statements of principles as a source of ethical standards to apply in their exercise of the "exclusive power" to regulate attorney conduct. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 2065, 80 L.Ed. 2d 674, 694 (1984); *Mine Workers*, 389 U. S. at 225 n.6. (rejecting ABA ethics opinion regarding U.P.L. by "lay agency"), 389 U.S. at 226 n.1. and 232 n. 15. (dissenting opinion of Justice Harlan citing ABA opinions on U.P.L. to support his dissent); *In re Corn Derivatives Antiturst Litigation*, 748 F.2d 157, 160 (3d Cir. 1984); *In re "Agent Orange" Product Liability Litigation v. Dow Chemical Co.*, 611 F. Supp 1452, 1458-1461 (D. C. N. Y. 1985); *O'Hara v. Ahlgren*, 127 Ill.2d 333, 130 Ill.Dec. 401, 537 N.E.2d 730, 735-736 (1989); *Schniederjon v. Krupa*, 130 Ill.App.3rd 656, 85 Ill.Dec 845, 474 N.E. 2d 805, 809 (Ill.App. 5th Dist. 1985); *Corti v. Fleisher*, 93 Ill. App.3d 517, 48 Ill.Dec. 74, 417 N.E.2d 764, 774, 776 (Ill. App. 1st Dist. 1981).

Since the courts themselves look to the ethics opinions and statements of principles as the source of standards to apply, the lower courts were in error when they failed to recognize that licensed lawyers would be affected by these ethics opinions and statements of principles of their own force in guiding their professional conduct. (App. 1, pp. 7-8) This affect is greater in Illinois than in most states because Illinois does not have an integrated bar which requires membership in the ISBA, and because neither the Illinois Supreme Court nor the ARDC issue, review or approve ethics opinions (Complaint, para. 38).

The ethics opinions in issue were not directed at any governmental body and have no legitimate purpose (Complaint, para. 234, 235, 236, and 246). As the Court stated in *Surety Title* in holding that the voluntary distribution of ethics opinions by the Virginia State Bar was anticompetitive activity under the Sherman Act:

> "One facet of the practice of law is advising clients as to the legality of a proposed course of conduct. Thus, lawyers are reputed to possess special expertise in interpreting statutes and judicial decisions and applying the distilled principles of law to future actions. Attorneys as a class, therefore, should be the last segment of society in need of advisory opinions...to contend that attorneys require these advisory opinions is to deny the very expertise which serves as partial justification for placing restrictions on who may practice law. The Unauthorized Practice of Law opinion process places attorneys in the unique position of being able to define the extent of their own monopoly."
> 431 F.Supp. at 308.

In dismissing the plaintiffs claim, the lower courts ignored significant factual allegations which, if proven at a later stage in this litigation, demonstrate that the ethics opinions, and the Model Rules which these opinions apply and interpret, have significant effects which are not exclusively attributable to the adoption of the Model Rules by the Illinois Supreme Court or to the adoption of the Model Code of 1969 by the District Court,

and that these effects proximately cause the type of injury to competition that the antitrust laws were intended to prevent.

V. THE ACTS OF THE PRIVATE ASSOCIATION DEFENDANTS TO RESTRICT COMPETITION ARE PART OF AN "ON GOING CONSPIRACY AND GROUP BOYCOTT" IN VIOLATION OF THE SHERMAN ACT.

ABA Informal Opinion 86-1519 is dated April 18, 1986 and was issued within four years of filing. (Complaint, para. 178. (a)(iii) and Exhibit CC). The defendants' conspiracy to restrain trade by prohibiting licensed lawyers from practicing law in multi-disciplinary firms is "ongoing and continuing" (Complaint, para. 230, 131, 133, 271), and the group boycott of private legal referral services, which is created by the private associations' ethics opinions, is also ongoing and continuing (Complaint, para. 220). When an antitrust claim arises from an "ongoing conspiracy," the plaintiffs' claims accrued at the time when they first suffered the effects of the unlawful activity, and the statute of limitations began to run from that time. *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968); *KFC Corp. v. Marion-Kay Co.*, 620 F. Supp. 1160, 1167 (S.D. Ind. 1985); *2361 State Corp. v. Sealy, Inc.*, 263 F.Supp. 845, 850 (N.D.Ill.1967); *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S.321,339 (1971).

The District Court's selection of 1982 as the cut off date for any anticompetitive effects of the ethics opinions in issue (App. 2, p. 9) ignores the fact that private legal referral services, such as LAWLINE, were not prohibited by the Illinois Code of 1980, and were not prohibited by the ABA Model Code of 1969 as adopted by the district court in 1982. The private association defendants have not rescinded the ethics opinions in issue (Complaint, para. 239) and continue to distribute these ethics opinions. See *Pennsylvania Dental Association v. Medical Service Association of Pennsylvania*, 815 F. 2nd 270, 278 (3rd Cir.1987). Accord, *Wilk v. American Medical Association*, 719 F. 2d 207 (7th Cir. 1983, on remand 671 F.Supp. 1465, 1475-1477 (N.D.Ill.1987). Indeed, the New Illinois Code was drafted between 1983 and 1987 by a

joint committee which included the CBA and ISBA (Complaint para. 144-145), and this committee submitted the proposed New Code to the ABA for review and approval in 1987 before submitting it to the Illinois Supreme Court (Complaint. para. 146).

VI. THE DRAFTING AND DISTRIBUTION OF THE ETHICS OPINIONS AND STATEMENTS OF PRINCIPLES BY THE PRIVATE ASSOCIATION DEFENDANTS WAS NOT EXEMPT UNDER THE DOCTRINE OF *PARKER V. BROWN.*

The purpose of the "state action" exception first articulated in *Parker v. Brown*, 317 U.S. 341 (1943), was to exempt the acts of state officers from liability under the Sherman Act when those acts were directed by the state legislature. 317 U.S. at 350-351. However, the Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) limited this exception to acts which were "compelled" by direction of the state acting as sovereign. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S.97, 103-106 (1980), the Supreme Court further restricted the *Parker* exception to restraints which are "clearly articulated and affirmatively expressed as state policy." 445 U.S. 105, quoting *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 410 (1978)(opinion of Brennan, J.) ; Accord, *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 51n. 14 (1982).

The ethics opinions of the private association defendants have not been reviewed or approved by any state or federal court, and are not necessary in order to make the Illinois Code work. The ethics opinion process results in the anticompetitive extension of state and federal rules beyond the limits of those rules as interpreted in judicial proceedings. *Mine Workers*, 389 U.S. at 225 n.6, 226 n.1., and 232 n. 15.

The "threshold inquiry" in the instant case is whether the drafting and distribution of the ethics opinions in issue were "compelled" by the state acting as sovereign. *Goldfarb*, 421 U.S. at 790. The obvious negative answer to this inquiry in the instant

case mandates that *Parker* immunity does not apply to the private association defendants regarding the drafting and distribution of these ethics opinions and statements of principles. *Goldfarb*, 421 U.S.at 790; *Ballard v. Blue Shield of Southern West Virginia*, 543 F.2d 1075, 1078-1079 (4th Cir. 1979).

VII. THE DISTRICT COURT ERRONEOUSLY HELD THAT THE PRIVATE ASSOCIATION DEFENDANTS DID NOT ACT UNDER COLOR OF LAW TO DEPRIVE THE PLAINTIFFS OF RIGHTS SECURED BY THE "CONSTITUTION AND LAWS" OF THE UNITED STATES IN VIOLATION OF 42 U.S.C. 1983.

The private association defendants voluntarily participated with the Illinois Supreme Court Committee on Professional Responsibility in the actual drafting of the proposed New Illinois Code prior to its submission to the Illinois Supreme Court (Complaint, para. 144-146). The Supreme Court has long recognized that joint participation and joint activity with state personnel, is action under color of state law on the part of private persons when the joint action results in infringement of rights under the "constitution and laws" of the United States. *United States v. Price*, 383 U. S. 787, 794 (1966). See also *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Adickes v. Kress & Co.*, 398 U.S. 144, 174 n.44 (1970).

The Illinois Supreme Court also established a "procedural scheme" for drafting the proposed New Illinois Code. This procedure provided no safeguards against misuse by private parties with economic self-interest to restrict the plaintiffs' fundamental freedoms of speech and association.

The Illinois Supreme Court failed to provide review by any economically disinterested commission of the Court, or of the legislature, in the procedural scheme which it designed to draft and propose the New Illinois Code.

The private association defendants misused this procedural scheme by including restrictions which were more extensive than

essential to protect the public from any speculative harm which might arise from licensed lawyers practicing law in multi-disciplinary firms in which other non-lawyer professionals could own an equity interest.

The private association defendants acted under color of law to deprive the plaintiffs of their rights under the "Constitution and laws" of the United States when they misused this defective procedural scheme in this manner *Lugar v. Edmondson Oil, Co.*, 457 U.S. 922, 941 (1982) (Complaint, para. 144-146, 153, and 259). As stated by the Supreme Court in *United States v. Classic* 313 U.S. 299, (1941):

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken," under color of "state law." 313 U.S. at 326, Accord, *West v. Atkins*, 108 S.Ct. 2250, 2255-2256 (1988); *Lugar v. Edmondson Oil Co*, 457 U.S. 922, 929 (1982); *Monroe v. Pape*, 365 U.S. 165, 172 (1961).

CONCLUSION

The challenged rules impact upon the fundamental freedoms of speech, association and access to the courts. The degree of interference with the public's access to the courts that Rule 5.4 presents is a question of fact which can only be determined by a trial on the merits. There was not a proper basis for the Appellate Court to sustain a dismissal for failure to state a claim, or to distinguish the instant case from *Mineworkers*. If this prohibition restricts access to the courts, as alleged by the plaintiffs, then the least restrictive standard must be applied to evaluate Rule 5.4.

There is nothing "abstract" in licensed lawyers seeking to gain access to conventional methods of corporate financing, such as the issuancce of stock to non-lawyers, as a means of funding potentially more cost efficient legal delivery systems which would compete with conventional law firms. The fundamental policy underlying the Sherman Act is that competition benefits the

general public by lowering prices and increasing the general public's access to lower priced goods and services. The least restrictive standard should have been applied. The state defendants did not assert any reason why such business formats pose harm to the public other than those which this Court rejected in *Mineworkers*. The lower court's dismissal for failure to state a claim, at least as it pertains to the state defendants, and the Section 1983 claim of Count II, must be reversed.

The private association defendants are not exempt from the antitrust laws simply because the blanket prohibition standard which resulted from their anticompetitive activities was enacted into law, as stated by the Appellate Court. The Appellate Court's sweeping generality regarding the exonerating effect of having this prohibition enacted into law completely ignores the precedent of this Court that did not recognize such a broad exonorating scope in *Allied Tube*. At a minimum, the court's entire dismissal of Count II for failure to state a claim under the Sherman Antitrust Act was premature.

Respectfully submitted,

_____

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APPENDICES

In the
United States Court of Appeals
For the Seventh Circuit

No. 90-2571

LAWLINE, *et al.*,

Plaintiffs-Appellants,

v.

AMERICAN BAR ASSOCIATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 7203—**James F. Holderman**, *Judge.*

ARGUED SEPTEMBER 19, 1991—DECIDED FEBRUARY 25, 1992

Before CUMMINGS and RIPPLE, *Circuit Judges*, and REYNOLDS, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* This case presents antitrust and constitutional challenges to two legal ethics rules recommended by the American Bar Association and adopted by the Illinois Supreme Court and the United States District Court for the Northern District of Illinois. The disciplinary rules at issue forbid lawyers from assisting laypersons in the unauthorized practice of law (the "unauthorized prac-

* The Honorable John W. Reynolds, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

tice rule") and also forbid lawyers from entering into partnerships with non-lawyers if any of the activities of the partnership consist of the practice of law (the "partnership rule"). Specifically, plaintiffs challenge ethics rules 5.4(b) and 5.5(b) contained in the ABA Model Rules of Professional Responsibility (the "Model Rules"). Model Rule 5.4(b) provides that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." Model Rule 5.5(b) states that "[a] lawyer shall not: assist a person who is not a member of the bar in the performance of activity that constitutes unauthorized practice of law." The Illinois Supreme Court and the Northern District of Illinois have adopted these rules verbatim. See Illinois Rules of Professional Conduct, effective August 1, 1990; Rules of Professional Conduct for the Northern District of Illinois, effective November 12, 1991, both containing the unauthorized practice rule at 5.5(b) and the partnership rule at 5.4(b).[1]

Plaintiffs contend that these two rules violate Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1 and 2). Plaintiffs also claim that the adoption of these two rules violates their constitutional right to due process and equal protection, as well as the rights secured them by the First Amendment. As a result of this alleged deprivation of rights, plaintiffs base part of their suit on the Civil Rights Act of 1871 (42 U.S.C. § 1983). They seek an award

[1] The amended complaint also challenges canon 3 and disciplinary rules 3-101(A) and 3-103 of the ABA Model Code of Professional Conduct (the "Model Code"), as adopted verbatim by the Northern District of Illinois in its Code of Professional Conduct pursuant to General Rule 3.52(B) of that court, and by the Illinois Supreme Court in the Illinois Code of Professional Responsibility, *Ill. Ann. Stat.* ch. 110A, Article VIII [Smith-Hurd 1985]. Because the ABA Model Rules superseded the ABA Model Code in 1983 and the challenged Model Code provisions are now extinct in Illinois state courts as well as the Northern District, this Court's analysis will focus on the applicable Model Rules as adopted and currently in force in both jurisdictions.

of money damages and a declaratory judgment that the contested rules are unconstitutional.

The district court dismissed plaintiffs' complaint on a Federal Rule of Civil Procedure 12(b)(6) motion for failure to state a claim on which relief can be granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. For the reasons discussed below, we affirm the judgment of the district court.

I.

The first amended complaint describes the initial plaintiff, Lawline, as an unincorporated association of lawyers, paralegals and laypersons with its principal office in Chicago. The other three plaintiffs are Thomas Holstein, an Illinois lawyer who is the managing director and supervising attorney of Lawline; LeNore Nelson, a paralegal serving as Lawline's office manager and head paralegal; and Joyce Novak, a Chicagoan described as a general factory worker for Procter and Gamble Co. who received information from Lawline regarding Chapter 7 bankruptcy proceedings.

According to the plaintiffs, Holstein founded Lawline in 1978 to use law students, paralegals and lawyers to answer legal questions from the public without charge over the telephone and to assist them in representing themselves in routine legal matters. Lawline's other stated purposes are to refer members of the public without financial resources to agencies providing legal services and to refer them to young lawyers who charge reduced fees, thus creating a "prototype legal delivery system" subsidized by referral fees. In its ten years of existence, Lawline is said to have answered legal questions for more than 500,000 people, particularly in Illinois, Indiana and Wisconsin, and also nationally through a toll-free telephone number.

Plaintiffs' first amended complaint consists of 109 pages and has 86 pages of exhibits. The complaint names as defendants the American Bar Association ("ABA"), the Illinois State Bar Association ("ISBA"), the Chicago Bar

Association ("CBA"), the Justices of the Illinois Supreme Court, the members of its Committee on Professional Responsibility, the members of its Attorney Registration and Disciplinary Commission ("ARDC"), the United States Trustee for the Northern District of Illinois, the United States Trustee's Assistant, and five members of the executive committee of the court below.

The ABA House of Delegates adopted Model Rule 5.4(b) and Rule 5.5(b) in 1983. Plaintiffs allege that the adoption of the two ethics rules at issue was the result of a conspiracy among the ABA House of Delegates, ISBA Delegates, and CBA Delegates to protect traditional law firms and restrain trade. In pursuance of the conspiracy the defendants allegedly agreed to have the three bar associations issue advisory ethics opinions prohibiting non-lawyers from owning financial interests in law firms and prohibiting lawyers from forming partnerships with non-lawyers if any of the activities of the partnership consist of the practice of law.

As stated in the amended complaint, the Northern District adopted Model Rule 5.4(b) and Rule 5.5(b) in its Rules of Professional Conduct. The district court's general rules have been amended from time to time and its most recent modifications came too late to be mentioned in the amended complaint. They were promulgated on October 29, 1991, and became effective November 12, 1991. The district court's rules still contain the same two assailed provisions. Similarly, the Illinois Supreme Court's Committee on Professional Responsibility proposed identical provisions in 1987, and Rules 5.4(b) and 5.5(b) were incorporated into the Illinois Rules of Professional Conduct effective August 1, 1990.

Plaintiffs further complain that in February 1988, defendants United States Trustee and his assistant reported to the Illinois Supreme Court's Attorney Registration and Disciplinary Commission that non-lawyers at Lawline were giving legal advice to debtors in Chapter 7 bankruptcy proceedings. According to the plaintiffs, this report resulted in an investigation of managing director Holstein.

A few months later the United States Trustee filed a motion in a bankruptcy proceeding to enjoin Lawline from engaging in the practice of law in bankruptcy proceedings. He also filed an adversary proceeding against plaintiffs Lawline, Holstein and Nelson in furtherance of the supposed conspiracy.

In their pleadings, plaintiffs assail the partnership rule and the unauthorized practice rule and assert that these provisions resulted from a conspiracy between the courts and the organized bar to monopolize the dissemination of legal advice in violation of the Sherman Act (Count I) and to deprive plaintiffs of their First Amendment rights to freedom of speech and association as well as their rights of due process and equal protection in violation of the 1871 Civil Rights Act (Count II). Count III sought a declaratory judgment that the Northern District and Illinois rules are unconstitutional on their face.[2]

Due to these alleged violations, plaintiffs contend that the defendants harmed Lawline by restricting it and other similar private law referral services from advertising. In addition plaintiffs allege that they were injured because Holstein and Nelson were prevented from forming a business entity to provide low-cost legal services, resulting in lost revenues of $650,000. In their prayers for relief, plaintiffs have sought treble damages, attorney's fees, and an injunction prohibiting the enforcement of the challenged rules and requiring defendants to adopt new rules permitting non-lawyers to own interests in law firms. They have also asked for an order requiring the establishment of a $1,000,000 re-

[2] Although the plaintiffs also challenged the two ethics rules as applied to them, plaintiffs have not been sanctioned by the Illinois Supreme Court or the Northern District and at oral argument the defendants stipulated that plaintiffs' conduct was not prohibited by the ethics rules at issue. Moreover, in their reply brief in this Court plaintiffs deny that any non-lawyers at Lawline have given legal advice without supervision by licensed lawyers. (Reply Br. at 2). Therefore, any argument concerning the application of the rules to the plaintiffs' conduct is not before us.

search institute to promote "the development of interprofessional models for the cost-efficient delivery of legal information" and the "assistance of the general public in pro-se representations." Finally, they have sought an order enjoining adoption of a new Illinois Code of Professional Responsibility. However, that request became moot when, after the dismissal of plaintiffs' case, the Illinois Supreme Court repealed the Code of Professional Responsibility effective August 1, 1990, and substituted therefor the Illinois Rules of Professional Conduct.[3]

The district court issued a memorandum opinion and order pursuant to Federal Rule of Procedure 12(b)(6) granting the defendants' motions to dismiss for failure to state a claim upon which relief can be granted. Judge Holderman thoughtfully addressed the merits of plaintiffs' claims. He also noted that the over-lengthy complaint was "often confusing, needlessly repetitious, and permeated with unnecessary evidentiary allegations" in violation of Rule 8 of the Federal Rules of Civil Procedure and constituted an alternate basis for dismissal of the complaint. *Lawline v. American Bar Ass'n*, 738 F. Supp. 288, 291 n.1 (N.D.Ill. 1990).

II.

A. Sherman Act Immunity

In the opinion below, Judge Holderman held that all defendants were immune from federal antitrust liability

[3] In November 1990, prior to filing a brief on the merits, defendants United States Trustee and Assistant United States Trustee commendably filed a motion to dismiss the appeal as to them in order for us to try to dispose of the matter in abbreviated fashion pursuant to this Court's suggestion in *Brooks v. Allison Div. of General Motors Corp.*, 874 F.2d 489, 490 (7th Cir. 1988). The supporting and opposing documents totaled 42 pages and the numerous remaining defendants did not file similar motions. Consequently, our then motion judge determined that the best course was to defer ruling on the motion to dismiss until the whole controversy was resolved. In accordance with this opinion disposing of the entire case, the motion to dismiss has become moot.

so that Count I was dismissed. 738 F. Supp. at 292-293. We agree.

As to the three bar associations, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, controls. The disciplinary rules at issue in this case were adopted by the Illinois Supreme Court and by the court below. It is because of their adoption by these two governmental bodies that plaintiffs are supposedly restrained from practicing law. As the Supreme Court held in *Noerr*, "Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." 365 U.S. at 136. It is immaterial that these rules were prompted by the defendant bar associations, because *Noerr* also decided that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive [here the judiciary acting in a legislative capacity] to take particular action with respect to the law that would produce a restraint or monopoly." *Id.* It is immaterial too that the bar associations encouraged the adoption of these rules because *Allied Tube & Conduit Corporation v. Indian Head, Inc.*, 486 U.S. 492, 499, decided that "those urging the governmental action enjoy absolute immunity for the anticompetitive restraint."

The plaintiffs also challenge as anticompetitive certain ethical opinions promulgated by the defendant bar associations. However, this Court has held that "when a trade association provides information" (by giving its approval in that case, its disapproval in this case) "but does not constrain others to follow its recommendations, it does not violate the antitrust laws." *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989) (citing *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284 (5th Cir. 1988)). This is so even where the organization at issue has a towering reputation. *Id.* Even if the Illinois State Bar Association had issued an opinion that it believed certain

types of conduct to be violative of the Illinois Rules of Professional Conduct, that opinion could have no anti-competitive effect unless the Illinois State Supreme Court or the Northern District agreed with the ISBA's assessment. It is Illinois' and the Northern District's promulgation and enforcement of the challenged ethics rules and not private parties' interpretation of those rules that restrains competition. In sum, the three bar associations are immune from the alleged antitrust liability.

The district court also correctly held that the justices of the Illinois Supreme Court,[4] the Attorney Registration and Disciplinary Commission, the Executive Committee of the district court, the United States Trustee and the United States Trustee's Assistant are immune from antitrust liability. The Illinois Supreme Court and the ARDC are protected by the state-action doctrine enunciated in *Parker v. Brown*, 317 U.S. 341. There the Supreme Court adopted a state-action immunity from the Sherman Act because its legislative history showed no congressional purpose to restrain state action or official action directed by a state. Here the Illinois Supreme Court was acting in a legislative capacity and therefore in the same position as a state legislature, so that the activities in question are exempt from Sherman Act liability. *Hoover v. Ronwin*, 466 U.S. 558, 568; *Bates v. State Bar of Arizona*, 433 U.S. 350, 360. The ARDC serves as an agent of the Illinois Supreme Court; consequently the members of the ARDC also enjoy antitrust immunity. *Bates*, 433 U.S. at 361; *Hoover*, 466 U.S. at 572-573.

Similarly, the Executive Committee of the district court is insulated from Sherman Act liability. The members of that committee consist of five federal district court judges who are responsible for supervising and disciplining attorneys practicing before them. Since they are serving as

[4] Our disposition of all counts with respect to the Illinois Supreme Court applies to its agent, the Committee on Professional Responsibility, as well.

instrumentalities of the United States, this suit cannot be maintained against them. *Rex Systems, Inc. v. Holiday*, 814 F.2d 994, 997 (4th Cir. 1987).

The United States Trustee and the Trustee's assistant were also made defendants. Because in their official actions they are federal executive officers (28 U.S.C. §§ 581-582) and were acting in their official capacities, they also are not liable under the Sherman Act. *Rex Systems*, 814 F.2d at 997.

As the district judge held, Count I must be dismissed because all the defendants are immune from federal antitrust liability.

B. Liability under Section 1983 of the Civil Rights Act of 1871

1. State Action

In Count II plaintiffs allege that defendants' adoption and enforcement of the disciplinary rules at issue contravene the First Amendment and the Due Process and Equal Protection clauses of the United States Constitution, thus violating Section 1983 of the 1871 Civil Rights Act. In order to establish a viable claim of deprivation of rights under Section 1983, plaintiffs must not only show that their constitutional rights were violated, they must also show that the defendants acted under color of state law. Here the three bar associations have not engaged in state action by formulating the disciplinary rules in question. *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 194 (holding that a state actor's voluntary decision to adopt a private association's rules did not transform the private association's rules into state rules nor did it transform the private actor into a state actor). In concluding that the private bar associations are not state actors for the purpose of Section 1983, this Court relies upon the fact that "the power to prescribe rules governing attorney conduct and to discipline attorneys for violating those rules, rests solely in [the Illinois Supreme Court]."

People ex rel. *Brazen v. Finley*, 119 Ill.2d 485, 494, 519 N.E.2d 898, 902 (1988). The Illinois Supreme Court has not only adopted its own disciplinary rules, but has also appointed an Attorney Registration and Disciplinary Commission not affiliated with the private bar associations to administer those rules. Similarly, the Northern District exercises exclusive power to regulate attorney conduct within its jurisdiction. See United States District Court for the Northern District, General Rules 3.51-3.53 (1991). Consequently, Count II is not viable against the three bar associations.[5] Therefore it becomes necessary to see whether Count II states a claim against the Illinois Supreme Court, the ARDC and the Northern District's Executive Committee. As state actors performing acts in their legislative capacity, these defendants are immune from money damages. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731-737.

2. Constitutional Challenges

Due Process and Equal Protection

Plaintiffs also seek a declaratory judgment that the rules in question are unconstitutional as violative of the Due Process Clause and the Equal Protection Clause. Unless a governmental regulation draws a suspect classification or infringes on a fundamental right, the government need only show that its regulation is rationally related to a legitimate state interest. As the district court explained (738 F. Supp. at 295), the two rules in question meet this test because they are designed to safeguard the public, maintain the integrity of the profession, and protect the administration of justice from reproach (quoting from *In re Schelly*, 94 Ill. 2d 234, 241, 446 N.E.2d 236, 239 (1983)).

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[5] In addition, the United States Trustee and the Assistant United States Trustee are immune from a § 1983 suit because they are federal officers and their actions fall short of establishing a private conspiracy with state officials to deprive plaintiffs of their constitutional rights. See *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204 (7th Cir. 1980).

The partnership rule limitation promotes the independence of lawyers by preventing non-lawyers from controlling how lawyers practice law. The regulation attempts to minimize the number of situations in which lawyers will be motivated by economic incentives rather than by their client's best interests. See L. Harold Levinson, *Independent Law Firms That Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 Ohio St. L.J. 229 (1990) (arguing that admitting non-lawyers into legal partnerships will impair the independence and decisional autonomy of lawyers and the legal profession). The state's interest in preserving the professional independence of lawyers is an adequate justification for the partnership rule and is within the legitimate interest of the state in governing the legal profession. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (noting that States have broad power in regulating professional practice).

The district judge also held that the unauthorized practice rule is rationally related to a legitimate state interest. In reaching this conclusion, Judge Holderman relied upon the following quotation from the 1987 ABA Model Code of Professional Responsibility:

> The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession. 738 F. Supp. at 295-296 n.8.

Some commentators disagree with government prohibitions against unauthorized practice, see, *e.g.*, Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Problems*, 34 Stan. L. Rev. 1 (1981) (arguing that restraints on lay

practice are not necessary to a state's interest in preventing incompetent legal assistance); Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 Am. B. Found. Res. J. 159 (tracing the history of restrictions on unauthorized practice and advocating their abolition); Milton S. Friedman, *Capitalism and Freedom* (1962) (arguing that licensure invariably leads to monopolistic control by members of an occupation). Although scholars may disagree about the effect of the legal ethics rules, the state may choose any regulations that are rational. When employing the appropriate rational basis test, this Court does not require that the state choose the wisest policy, only that it choose a constitutional one.

In sum, we too conclude that the assailed rules bear a rational relation to proper state goals, thus requiring the dismissal of the equal protection and due process claims.

First Amendment

The plaintiffs also assert that both the unauthorized practice rule and the partnership rule violate their First Amendment rights in violation of Section 1983 of the Civil Rights Act.

The plaintiffs contend that the unauthorized practice rule violates their First Amendment freedom of speech. Plaintiffs have conceded that the states have a right to restrict the practice of law to qualified individuals (Br. 13), thus justifying the unauthorized practice rule's provision that lawyers may not assist non-lawyers in the unauthorized practice of law. Any abridgment of the right to free speech is merely the incidental effect of observing an otherwise legitimate regulation. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 459, 467-468; *Accountants Society of Virginia v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988). While the practice of law and the exercise of free speech are not indistinguishable, neither are they mutually exclusive. As Erwin Griswold noted, "there

are many things that lawyers do * * * which are properly also done by others." Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 Am. B. Found. Res. J. 159, 195. There may well be many activities which lawyers routinely engage in which are protected by the First Amendment and which could not be constitutionally prohibited to laypersons. However, this Court will not strike down the unauthorized practice rule as facially invalid on the assumption that the Illinois Supreme Court and the Northern District will construe their unauthorized practice prohibitions so broadly as to infringe upon protected First Amendment rights.[6] Although we uphold the validity of the unauthorized practice rule against facial constitutional attack, we do not speculate as to whether this regulation would be constitutional as applied to particular cases.

Plaintiffs also complain that "the practice of law" term in the unauthorized practice rule is unconstitutionally vague. This claim too has no merit. A statute may be void for vagueness if it is vague in all of its applications, *Coates v. Cincinnati*, 402 U.S. 611, or if vague as applied, *Parker v. Levy*, 417 U.S. 733, 753-758. The unauthorized practice rule is not vague in all of its applications. There are some activities which clearly constitute the practice of law, such as representing another person at trial or signing legal documents filed in court on behalf of another person. Furthermore, as the unauthorized practice rule has not been applied to the plaintiffs' conduct, it may not be challenged as applied.

Finally, plaintiffs challenge the partnership rule as violative of their First Amendment freedom of association. In support of their claim, plaintiffs cite *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217. In that case the Supreme Court held that union members had a First Amendment right to collectively employ an attorney.

[6] Indeed, plaintiffs do not refer to any Illinois or Northern District cases which adopt an overbroad interpretation of the unauthorized practice rules.

It therefore invalidated an Illinois Supreme Court injunction that prevented the union's conduct as the unauthorized practice of law. In reaching its holding, the Supreme Court rejected the Illinois State Bar Association's argument that allowing a union to employ a lawyer would lead to "baseless litigation and conflicting interests between the association and individual litigants." *Id.* at 223. Although the rationales advanced here in support of the partnership rule are exactly those advanced in the *Mine Workers* case, defendants have inexplicably failed to mention that case. This is so even though plaintiffs rely on this authority for the proposition that the inherent threat of public harm from allowing lawyers to practice law as partners of non-lawyers is as speculative as the threat posed by allowing lawyers to practice law as employees of non-lawyers.

Although this Court notes that the interests sought to be protected by the state in this case are nearly identical to those advanced in *Mine Workers*, there is an important difference between the two cases. *Mine Workers* does not establish laypersons' right to associate with lawyers in the abstract. Rather it supports the proposition that laypersons have a right to obtain meaningful access to the courts, and to enter into associations with lawyers to effectuate that end. In *Mine Workers* plaintiffs had shown that the association prohibited by the state rule was necessary for the union members in order to realize their right to free speech, petition and assembly. As the Court said in *United Transp. Union v. State Bar of Michigan*, the common thread in the line of cases that includes *Mine Workers* and *NAACP v. Button*, 371 U.S. 415, "is that collective activity undertaken to provide meaningful access to the courts is a fundamental right within the protection of the First Amendment." 401 U.S. 576, 585-586. This interpretation of Supreme Court precedent comports with the traditional understanding that freedom of association provides "a right to join with others to pursue goals independently protected by the first amendment." Laurence Tribe, *American Constitutional Law*, 1013 (2d ed. 1988).

In this case, however, no such fundamental right is at issue. Plaintiffs have not shown that laypersons will be deprived of meaningful access to the courts if lawyers are unable to form partnerships with laypersons. Thus the heightened scrutiny of the state's justification in *Mine Workers* has not been triggered in this case.

Like the unauthorized practice rule, scholars disagree about the desirability and effect of the partnership rule. Jurisdictions that disagree with restrictions on legal partnerships can change, and at least one jurisdiction already has changed, those rules. See Note, *Law Firm Diversification and Affiliations Between Lawyers and Nonlawyer Professionals*, Geo. J. Legal Ethics, Vol. III, No. 4, 885 (1990) (discussing Washington D.C.'s abandonment of the partnership rule). However, this Court is not persuaded that states are constitutionally required to do so.

Since these two rules do not violate the Due Process and Equal Protection clauses or the First Amendment, Count II was properly dismissed.

C. Dismissal of Count III

In Count III plaintiffs have sought a declaratory judgment under 28 U.S.C. §§ 2201-2202 that these rules are unconstitutional under the First and Fourteenth Amendments. The declaratory judgment act does not give subject matter jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667. As shown, Counts I and II were properly dismissed and therefore there is no basis for Count III. It was properly dismissed for want of jurisdiction.

Judgment of dismissal affirmed.

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APPENDIX 2

Challenged Rules

ABA MODEL RULES (1983)

Rule 5.4 (b) of the ABA Model rules of Professional Conduct provides:

A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

Model Rule 5.5 (b) of the ABA Model Rules of Professional Conduct provides:

A lawyer shall not ... assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

ABA MODEL CODE (1969)

DR 3-101 (A) of the ABA Model Code of Professional Responsibility provides:

A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

DR 3-103 (A) of the ABA Model Code of Professional Responsibility provides:

A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

RULES OF U.S. DISTRICT COURT AT TIME OF SUIT

Rule 3.51 (b) of the General Rules of the United States District Court for the Northern District of Illinois provides:

The disciplinary powers of this Court are vested in its Executive Committee.

Rule 3.54(b) of the General Rules of the United States District Court for the Northern District of Illinois provides in part:

Any attorney authorized to practice before this Court who has committed any act or acts of professional misconduct such

as ..... failure to abide by the provisions of the code of Professional Responsibility of the American Bar Association may be disbarred from further practice before this court.

ILLINOIS RULES EFFECTIVE AUGUST 1,1990

Rule 5.5(b) of the Illinois Rules of Professional Conduct provides:

A lawyer shall not ... assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Rule 5.4(b) of the Illinois Rules of Professional Conduct provides:

A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

ILLINOIS RULES AS PROPOSED AT TIME OF SUIT

Rule 3-101. Aiding Unauthorized Practice of Law

(a) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

Rule 3-103. forming a Partnership with a Nonlawyer

(a) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

Rule 3-104. Practicing in a Firm with a Nonlawyer Principal

(a) A lawyer shall not practice with or in a firm engaged in the practice of law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) a nonlawyer is a corporate director or officer thereof, except that a nonlawyer may serve as secretary thereof if such secretary performs only ministerial duties.

1980 ILLINOIS CODE AT TIME OF SUIT CHALLENGED RULES

Rule 3-101(a) of the Illinois Code of Professional Responsibility provided:

A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

Rule 3-103 of the Illinois Code of Professional Responsibility provided:

A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

ILLINOIS CODE (1980) CHALLENGED RULES

Ill. Rev. Stat. ch. 110A Canon 3 provides:

A Lawyer Should Assist in Preventing the Unauthorized Practice of Law.

Ill. Rev. Stat. ch. 110A, R. 3-101 (a) provides:

A Lawyer shall not aid a nonlawyer in the Unauthorized practice of law.

Ill. Rev. Stat. ch. 110A, R. 3-103 provides: any of the activities of the partnership consist of the practice of law.

ILLINOIS CODE (1980) RULES SPECIFICALLY ADDRESSING CONFLICT OF INTEREST & LOYALTY TO CLIENT

Ill. Rev. Stat. ch. 110A, R. 2-106 (a) provides:

A lawyer shall not enter into an agreement for, charge, or collect an illegal or excessive fee.

Ill. Rev. Stat. ch. 110A, R. 2-109 (b) provides:

After accepting employment on behalf of a client, a lawyer shall not thereafter delegate to another lawyer not a partner or association in his law firm the responsibility for performing or completing that employment without the client's consent.

Ill. Rev. Stat. ch. 110A, R. 5-101 (a) provides:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his pro-

fessional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

Ill. Rev. Stat. ch. 110A, R. 7-101 provides:

(a) A lawyer shall not intentionally

(1) fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules, except as provided by Rule 7-101 (b); however, such "reasonably available means" do not include

(A) refusing to accede to reasonable requests of opposing counsel which do not prejudice the rights of his client,

(B) failing to be punctual in fulfilling all professional commitments,

(C) engaging in offensive tactics, or

(D) failing to treat with courtesy and consideration all persons involved in the legal process;

(2) fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under Rules 2-110, 5-102, and 5-105; or

(3) prejudice or damage his client during the course of the professional relationship, except as required under Rule 7-102(b).

(b) In his representation of a client, a lawyer may refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

APPENDIX C

(Partial Transcript of ABA House of Delegates)

DEBATE Rejecting Kutek Commission Draft Rule 5.4, And Adopting Blanket Prohibition February 8, 1983

...knowledge how you're to act, it's commendable to be in the public interest, but by adding confusion or something that is non-workable, that is not in the public interest. And I would oppose this amendment. Thank you.

CHAIR: We move now to Rule 5.4.

PROFESSOR HAZARD: This rule may involve somewhat more controversies than the ones we just been referring to. The problem that is presented is that lawyers work in work settings these days that are not limited to the traditional law firm or partnership or corporate law department or government law department. There are those arrangements, but there are other kinds, and indeed there are many variations in the structure, organization and procedure of such various organizations as corporate law departments, large spread law firms, insurance companies that provide legal representation directly to their insureds, legal aid agencies, legal clinics, and the like. In the face of that, the Commission recommends that the structure of the rules dealing with this problem focus on the problem of professional independence of the lawyer and his compliance with the rules of professional conduct.

(End of side one.)

PROFESSOR HAZARD: (continued): ...particularly the question of any ownership by a layperson in an organization which provides legal services. The difficulty with that is that

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it seems to address attention to the financial structure as distinct from the professional function of the organization. But there are obviously different views on how this problem ought to be approached, and that is the subject of the amendment.

CHAIR: The chair recognizes Phil Anderson.

CHAIR: Mr. Hawkins at microphone 4 has a question.

BOB HAWKINS: Professor Hazard, would the rule as proposed by the Commission permit a business corporation such as Sears Roebuck or H & R Block to open law offices staffed by salaried lawyers in shopping centers across the country?

PROFESSOR HAZARD: Yes.

* * * * * * *

CHAIR: We will move now to consideration of the amendment of the Section of General Practice. The chair recognizes Al Conant.

AL CONANT: Thank you Mr. Chairman, ladies and gentlemen. You will be as delighted as I to know that this is the last rule for which I will rise. However, there is not an occasion on which I have risen today that I think is more important than this. This rule, I believe, if adopted in its present form will have incredibly long-term affects upon this profession. Fortunately, I cannot tell you what those affects are, but I don't believe anyone can. The question that was asked earlier today, I answered part

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of it for you, is does this rule authorize Sears Roebuck to open to get into the law business? Yes it does, as Professor Hazard so candidly admitted. It also authorizes the big-eight law firms to get into the law business. It also authorizes anyone else in the business world to get into the law business. Now is that good or bad? I don't know. Will (t) result in cheaper services to the consumer? I don't know, but nobody can tell you that it will. Will it result in better services to the consumer? I don't know. I doubt it, but no one can tell you that it will. Will it destroy the economic existence of individual lawyers? I don't know, but nobody can tell you that it won't. Will it affect the lawyer's independence of judgment? I don't know, but nobody can assure you that it won't. Along that line, I appreciate the efforts of the Commission to in the formalities of that Rule to ensure that the lawyer's continued independence, but I suggest to you that that's a breech of the golden rule. The one who has the gold makes the rules, and the one that has the gold under existing 5.4, is going to be a non-lawyer. No one can tell you what the impact of 5.4 is going to be on the legal profession, but everyone can assure you, and you can assure yourself merely by reading it, that it is going to have a major impact and mark a fundamental change in the practice of law. Now what the General Practice Section is here proposing is the adulation of 5.4 and the substitution therefor of the existing rules in the Code of Professional Responsibility dealing with the ways in which law can be prac-

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ticed and the organizations in which law can be practiced. The reason why we have done that is because under the existing rules, we do know what the impact is. We have been living with them since 1969, and they have served us well. The dooms-day prophecies of my good friend and colleague, Mr. Archer and others, are simply untrue. Under the existing rules, we have developed Legal Services Corporation; under the existing rules we have developed legal clinics in various and sundry forms; under the existing rules we have been free to experiment in various ways with the delivery of legal services to the middle class and to the indigent. We know what we can do under the existing rules; we don't know whether we have fully explored all that we can do under the existing rules, but what we do know is that under 5.4, there are no rules. The comment to this section makes that clear even to the Commission's own view. Given the complex variety of modern legal services, it is impractical to define organizational forms that uniquely can guarantee compliance with the rules of professional conduct. Wrong. We have such rules today; they guarantee compliance with the rules of professional conduct and the Code of Professional Responsibility, give our profession room to experiment, and guarantee the independent of the attorney. Thank you.

CHAIR: Thank you. The chair recognizes Michael Franck.

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MICHAEL FRANCK: Mr. Chairman, ladies and gentlemen of the House, let me make clear first of all that the issue is not whether we like or dislike this rule. If ther were the issue, I might not be speaking now or speaking on the other side. We have to recognize reality. This is essentially the same issue as the New York State matter that you defeated. Mr. Conant has inadvertently supported what I told you earlier. He said in his first remarks he did not know whether this would be good or bad for the consumer. That ends the case. If the state cannot say "we don't know whether it's good or bad," there is no argument the state can muster to justify this regulation. That is the law. If the state has no good reason it can assert for harm to the public for a regulation, that regulation which interferes with the marketplace falls. So the reality which we have to face, whether we like it or not, is that this kind of practice is permissible and cannot be touched throough these rules. It is then our duty to fashion rules which would protect the public by guaranteeing the independence of the lawyer in those forms of practice which we cannot prevent. That's what I told you earlier; that's what I tell you again now is the affect of Rule 5.4 as proposed to you. I urge you to defeat the amendment and to vote for the Commission's proposal.

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CHAIR: The chair recognizes Mr. F. William McCalpin, Secretary of the Association.

F. WILLIAM McCALPIN: Thank you very much, Mr. Chairman. Ladies and gentlemen of the House, except for matters relating to Constitutional amendments of this Association and housekeeping matters, I have not addressed this House in the three and a half years that it has been my privilege to serve as your secretary. But I could not let this matter pass without raising my voice in protest in opposition to this amendment. In August of 1969, I offered the only amendment to the then proposed Code of Professional Responsibility, and it was precisely in this area. That amendment was defeated, but in the meantime, the law has caught up and the substance of that amendment was adopted and made the law of this land, and I say to those of you who do not know the cases, they are Button brotherhood and United Mine Workers, decided by increasing majorities and ultimately unanimous Supreme Court of the United States. And I say to you that on the strength of those cases, Subdivision B and Subdivision D of this amendment do not pass constitutional muster. The states have not and cannot show a compelling state reason for the regulation proposed in those subsections.

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Pages 44, 45, 48

(2)

FILED
OCT 29 1993
OFFICE OF THE CLERK

NO. 93-529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LAWLINE, *et al.*,

Petitioners

v.

AMERICAN BAR ASSOCIATION, *et al.*,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT THE CHICAGO BAR ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the corrected Petition was "promptly substituted" as required by Supreme Court Rule 33.7 after the original Petition was rejected for formal defects.

B. Whether the Petition should be denied for mootness because the disciplinary charges brought against petitioners were dismissed.

C. Whether the Court of Appeals ruled consistently with this Court's decisions in holding that the CBA's alleged conduct is immune from antitrust liability under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

D. Whether the Petition fails to raise issues warranting review by this Court because petitioners' antitrust claims are barred by the Clayton Act's four-year statute of limitations.

E. Whether the Court of Appeals ruled consistently with this Court's decisions in holding that the constitutional claims against the CBA fail to allege state action under *N.C.A.A. v. Tarkanian*, 488 U.S. 179 (1988).

LIST OF PARTIES

The parties to the proceedings below were:

The petitioners:

Lawline, an unincorporated association of lawyers, paralegals and laypersons;

Thomas Holstein;

LeNore Nelson;

Joyce Novak;

The respondents:

The Justices of the Supreme Court of Illinois;

The members of its Committee on Professional Responsibility;

The members of its Attorney Registration and Disciplinary Commission ("ARDC");

The United States Trustee for the Northern District of Illinois;

The United States Trustee's Assistant;

Five members of the executive committee of the District Court for the Northern District of Illinois;

The American Bar Association ("ABA");

The Illinois State Bar Association ("ISBA"); and

The Chicago Bar Association ("CBA").

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NO. 93-529

IN THE

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OCTOBER TERM, 1993

LAWLINE, *et al.*,

Petitioners

v.

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Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT THE CHICAGO BAR ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE AND FACTS

The petitioners are Lawline, Thomas Holstein, LeNore Nelson and Joyce Novak. Lawline is an association of lawyers and laypersons. (Complaint, Count I, ¶2.)[1] Holstein is a licensed attorney who serves as the managing director of Lawline. (Complaint, Count I, ¶1.) Nelson is the head paralegal and office manager of Lawline. (Complaint, Count I, ¶3.) Novak received information concerning a Chapter 7 bankruptcy from Petitioner Nelson. (Complaint, ¶¶1-4.)

Petitioners filed their complaint on August 19, 1988 and an amended complaint on December 9, 1988, naming as defendants

[1]All citations to the "complaint" are to the First Amended Complaint filed on December 9, 1988.

numerous federal and state officials responsible for issuing and enforcing the rules governing attorney conduct before the United States District Court for the Northern District of Illinois (the "Northern District") and the Illinois courts. They include all Justices of the Supreme Court of Illinois, members of its Attorney Registration and Disciplinary Commission and the members of the Executive Committee of the Northern District. Also named as defendants are the American Bar Association ("ABA"), the Illinois State Bar Association ("ISBA"), the Chicago Bar Association ("CBA"), the United States Trustee for the Northern District and his assistant.

Petitioners' allegations against the CBA center on the CBA's supposed participation in the drafting and promulgation of the ABA Model Code of Professional Responsibility (the "ABA Model Code") and the ABA Model Rules of Professional Conduct (the "ABA Model Rules").

A. The Courts' Adoption of the ABA Model Code and Rules.

The ABA Model Code, first published in 1969, prohibits the practice of law by associations of lawyers and laypersons. ABA Model Code, Canon 3, Disciplinary Rules 3-101, 3-103. In 1980, the Illinois Supreme Court, using the ABA Model Code as its blueprint, enacted the Illinois Code of Professional Responsibility (the "Illinois Code") to govern the professional conduct of attorneys practicing in Illinois. Ill.Rev.Stat. ch. 110A, Art. VIII. The Illinois Supreme Court, through its Attorney Registration and Disciplinary Commission ("ARDC"), was solely responsible for enforcement of the Illinois Code. Ill.Rev.Stat. ch. 110A, Rules 751-754.

Canon 3 and Rules 3-101 and 3-103 of the Illinois Code, which were identical to their ABA Code counterparts, provided:

CANON 3

A Lawyer Should Assist In Preventing
The Unauthorized Practice Of Law

Rule 3-101. Aiding Unauthorized Practice of Law

(a) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

* * *

Rule 3-103. Forming a Partnership with a Nonlawyer

A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

The Local Rules of the Northern District incorporate the ABA Model Code provisions and also prohibit the practice of law by associations of lawyers and laypersons. General Rule 3.54. Under General Rule 3.51, the District Court's Executive Committee has exclusive responsibility for enforcing General Rule 3.54.[2]

In 1983, the ABA promulgated the ABA Model Rules which were essentially the same as the Model Code and Illinois Code. Before adopting the Model Rules, the ABA House of Delegates considered and rejected a proposed rule that would have permitted associations of lawyers and nonlawyers to practice law. (Complaint, Count I, ¶¶ 75-80.) Consequently, the ABA Model Rules continue to prohibit the practice of law by such entities. Rule 5.4(b) states:

---

[2]Petitioners also challenge "Rule 3-101(a) and 3-103(a) of the newly proposed Illinois Code." (Complaint, Count I, ¶19.) On February 8, 1990 the Illinois Supreme Court replaced the Code of Professional Responsibility with the Illinois Rules of Professional Conduct, Ill.Rev.Stat. ch. 110A, Rules 1.1, *et seq.*, which took effect August 1, 1990, after the District Court's order dismissing the complaint. As the District Court noted, the provisions of the new Illinois Rules relating to professional independence and the unauthorized practice of law are the same in substance as those in the ABA Model Code and the old Illinois Code. *See* new Illinois Rule 5.4(b) ("A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.") and the new Illinois Rule 5.5 ("A lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."), as set forth in the Petition at p. 44b.

> [a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

Similarly, Rule 5.5(b) states that:

> [a] lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. (See petition, p. 43b).

Petitioners allege that a joint committee of the CBA and ISBA prepared suggested revisions to the Illinois Code in light of the ABA Model Rules. (Complaint, Count I, ¶144.) The proposed revisions, however, left unchanged the existing Illinois Code provisions concerning the ability of lawyers and nonlawyers to form an association for the purpose of practicing law. (Complaint, Count I, ¶152.) Accordingly, by 1982, the state of the law was that both the Illinois Supreme Court and the Northern District had adopted provisions prohibiting the practice of law by associations of lawyers that were essentially identical to the ABA's 1983 model provisions.

B. Petitioners' Allegations Against the CBA.

Petitioners contend that these ABA Model Code and Model Rules provisions are the product of a conspiracy among the bar associations to exclude associations of lawyers and laypersons from the practice of law. (Complaint, Count I, ¶¶205-210.) They allege that the CBA is a party to this conspiracy because, although it took no action, some of its members also belong to the ABA or ISBA. (Complaint, Count I, ¶9.) They further allege that two delegates representing the CBA in the ABA House of Delegates voted against the proposed rule that would have permitted associations of lawyers and laypersons to practice law under the ABA Model Rules. (Complaint, Count I, ¶¶89, 90.)

Petitioners also claim that, in furtherance of this alleged conspiracy, the CBA issued two ethics opinions concerning the un-

authorized practice of law, one in 1971, the other in 1977. They contend that the CBA enforces these ethics opinions with threats of governmental disciplinary proceedings and "peer pressure." (Complaint, Count I, ¶¶178, 220, 249.)

Petitioners also assert that in 1988 the United States Trustee and his assistant reported to the ARDC that nonlawyers at Lawline were giving legal advice in bankruptcy proceedings, and later filed a motion in a bankruptcy proceeding to enjoin Lawline from engaging in the practice of law in those proceedings (Petition pp. 1, 30a, 31a). These charges were dismissed after petitioners filed their lawsuit and before the District Court's decision (Petition p. 1).

Based on these allegations, petitioners assert antitrust and constitutional claims against the CBA. Their principal antitrust claim is that the CBA has combined and conspired with the other bar associations to exclude entities such as Lawline from the practice of law. (Complaint, Count I, ¶209.) Petitioners allege as well that the bar associations have engaged in a group boycott of entities such as Lawline. (Complaint, Count I, ¶111.) As for their constitutional claims, petitioners allege that the CBA has deprived them of constitutional rights, in violation of Section 1983 of the Civil Rights Act of 1871, as amended. Specifically, they contend that the Illinois Code, the ABA Model Code and the ABA Model Rules deprive them of their First Amendment rights of freedom of speech and association. (Complaint, Count II, ¶¶18, 19.)

The CBA's motion to dismiss for failure to state a claim was granted by the United States District Court for the Northern District on May 24, 1990, as were those of the other defendants. Petitioners filed a timely notice of appeal on July 20, 1990.

On February 25, 1992, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's dismissal. The

Seventh Circuit ruled that the CBA's conduct was immune from antitrust liability because the source of the challenged restraints was valid governmental action (the adoption by the state and district courts of the Illinois Code and Northern District Rules, respectively) rather than the CBA's or other bar association conduct. The court dismissed petitioners' constitutional claims against the CBA for failure to allege state action. (Petition, pp. 33a-36a).[3] The Seventh Circuit also noted that petitioners were never sanctioned by either the Illinois Supreme Court or the Northern District and that respondents stipulated at oral argument that petitioners' conduct was not prohibited by the ethics rules at issue (Petition, p. 31a, n.2). Consequently, the Seventh Circuit found that any argument concerning the application of the rules to petitioners' conduct was not before the court (*id.*).

On May 26, 1992, Petitioners filed their original Petition for a Writ of Certiorari. However, the original Petition was rejected because of various formal defects. Petitioners did not file their corrected Petition until October 1, 1993, more than 16 months after the original due date.

SUMMARY OF ARGUMENT

The Petition should be denied because it is untimely, the case is moot and the courts below did not misapply any controlling legal standard of this Court.

Although as required by Rule 13.1, the original Petition was filed within 90 days after the Seventh Circuit's judgment, the current Petition is untimely because it was rejected for various defects in form and the corrected Petition was not "promptly substituted" as required by Supreme Court Rule 33.7. Instead, it was not filed until 16 months after the original due date.

[3]Although the District Court also had ruled that petitioners' antitrust claims were time-barred, the Seventh Circuit did not expressly address this issue.

The case is moot because the disciplinary charges brought against petitioners prompting their lawsuit were dismissed before the District Court's May 24, 1990 decision and no sanctions were ever imposed on petitioners by any court. Therefore, they have suffered no injury that can be redressed and no case or controversy exists.

The Seventh Circuit's rulings regarding the CBA not only do not conflict with any decision of this Court but are entirely consistent with them. Under the *Noerr* case, the CBA is immune from antitrust liability for any alleged actions relating to the publication of model standards of attorney conduct, lobbying for their adoption and issuing ethics opinions because the Illinois Supreme Court and the Northern District enacted those same standards into law and have sole authority and responsibility for enforcing those laws. Allegations of a boycott or conspiracy fail to defeat this immunity and no law is cited by petitioners to show otherwise. Independently, the complaint allegations, even if proved, would be insufficient to show that the alleged "conspiracy" had any anticompetitive effects.

Petitioners' antitrust claims also are barred by the applicable four-year statute of limitations. Their complaint does not allege any anticompetitive act by the CBA within the four-year period. This defect is not cured by petitioners' assertion that the CBA is part of an ongoing conspiracy because petitioners have not alleged any overt act by the CBA in furtherance of the conspiracy within the limitations period. This Court's "continuing violation" rule requires more than petitioners' allegation of a continuing injury from a pre-limitations act.

With respect to petitioners' constitutional claims, the Seventh Circuit's ruling that the CBA's alleged activities did not amount to state action was correct under this Court's ruling in *N.C.A.A.*

v. Tarkanian, because the Illinois Supreme Court retained final authority to accept or reject the model standards.[4]

ARGUMENT

A. The Petition Should Be Rejected As Untimely

Petitioners submitted their original Petition for Writ of Certiorari on May 26, 1992, within 90 days of the Seventh Circuit's February 25, 1992 judgment. However, the original petition was rejected because of various defects, including its failure to comply with the form requirements of Supreme Court Rule 33.

Petitioners did not then file their current Petition until October 1, 1993, more than 16 months after the original due date. Under Supreme Court Rule 33.7 a petition rejected for formal defects may be deemed untimely if new and proper copies are not "promptly substituted." That rule further provides that the Court may impose appropriate sanctions for noncompliance, including but not limited to dismissal of the action. The passage of 16 months is hardly "prompt." It is the antithesis—dilatory and incurable. In light of petitioner's extraordinary delay, dismissal of the action is appropriate for this reason alone.

B. The Petition Should Be Denied Because The Case Is Moot.

There ceased to be a live case or controversy here when the disciplinary proceedings against petitioners were dismissed. Then

[4]The same arguments have equal force with respect to the CBA's alleged participation with the Illinois Supreme Court's Committee on Professional Responsibility in drafting the 1990 Illinois Rules before they were presented to the Illinois Supreme Court. The Committee did not make the decision. And in any event, any activity relating to the new Illinois Rules is irrelevant because those rules were not adopted until 1990, after petitioners' lawsuit was filed, and were identical in all relevant respects to the 1980 Illinois Code. Therefore, the new Rules could not have caused petitioners the injury they complain of and have no bearing on this case.

threatened action by the United States Trustee for the Northern District and his assistant and potential sanction by the ARDC disappeared. All charges brought against petitioners both in the bankruptcy court and before the ARDC were gone (Petition p. 9). Petitioners were not sanctioned by either the Illinois Supreme Court or the Northern District and respondents agreed in oral argument before the Court of Appeals that petitioners' conduct does not violate the ethics rules at issue (Petition p. 31a, n.2). Consequently, there is no "case or controversy" between the parties and the petition is moot.

To satisfy the constitutional case-or-controversy requirement, this Court has consistently held that a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision. *See Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 70 (1983). This requirement exists at every stage of the proceedings, including the appellate stages. *See Steffel v. Thompson*, 415 U.S. 452, 459, n. 10 (1974).

Here, petitioners were never injured. All disciplinary charges were dismissed and petitioners were never sanctioned. As a result, they suffered no "actual injury" that can be redressed in court. Therefore, petitioners no longer have a "personal" stake in this litigation. *See United States Parole Comm. v. Geraghty*, 445 U.S. 388, 396-397 (1980), *citing*, *Flast v. Cohen*, 392 U.S. 83, 100-101 (1968).

Because "the issues presented are no longer 'live' [and] the parties lack a legally cognizable interest in the outcome," the case is moot. *United States Parole Comm.*, 445 U.S. at 396, *quoting*, *Powell v. McCormack*, 395 U.S. 486 (1969). Petitioners offer no legal or factual support for their contrary argument (Petition p. 9).

Even if petitioners were to argue that an exception exists because the case is "capable of repetition, yet evading review," that possibility is theoretical at best and that is not enough to avoid

the effect of mootness. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982). To come within the exception, there must be a " 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party.' " *Id. citing Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). No facts justify that conclusion here. To the contrary, during oral argument before the Seventh Circuit, respondents stipulated that petitioners' conduct was not prohibited by the ethics rules at issue. In light of this stipulation, made in open court, there can be no reasonable expectation that respondents will ever take action causing the same controversy to arise again. Accordingly, the petition should be denied for mootness if not otherwise denied.

C. The Seventh Circuit's Rulings Relating To The CBA Are Consistent With Applicable Decisions Of This Court.

1. The Seventh Circuit Correctly Ruled That The CBA's Alleged Conduct Is Exempt From Antitrust Liability Under This Court's Holding In Noerr.

The Seventh Circuit held that the CBA was immune from federal antitrust liability under the principles articulated by this Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (Petition, p. 33a). In *Noerr*, this Court held that "[w]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." 365 U.S. at 136. Because the enforceable source of the alleged restraints on petitioners' practice of law here was the Illinois Code and Northern District Rules rather than the private action by the CBA or other bar associations, the CBA's alleged conduct, if true, is immune from federal antitrust liability (Petition, p. 33a).[5]

[5]Although the Seventh Circuit did not expressly so rule, petitioners' antitrust allegations against the CBA are independently time-barred because the most recent act alleged of the CBA occurred more than four years before the complaint was filed. The Sherman Act's statute of limitations is therefore an alternate basis to deny the petition.

a. The ABA Code And Model Rules Do Not Restrain Trade Of Their Own Force.

This Court's ruling in *Noerr* provides that restraints on competition that are the result of valid government action, rather than private action, cannot violate the Sherman Act. *Noerr*, 365 U.S. at 135-36. Further, restraints resulting from efforts to influence government action do not give rise to antitrust liability, even if those efforts are concerted and anticompetitively motivated. *Allied Tube & Conduit Corp. v. Indian Head Inc.*, 486 U.S. 492, 499 (1988) The scope of *Noerr* immunity depends on the source of the challenged restraint. Where, as here, government action causes the restraint, then lobbying itself is protected because "those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Allied Tube*, 486 U.S. at 499 (quoting *Noerr*, 365 U.S. at 136). Anticompetitive private action that does not restrain competition "of its own force" retains its *Noerr* immunity from antitrust scrutiny. *Allied Tube*, 486 U.S. at 510.

As the District Court aptly noted, "[i]t is undisputed that if plaintiffs are restrained from practicing law, it is because of the Illinois Supreme Court's enactment of the Illinois Code of Professional Responsibility and the District Court's adoption of General Rule 3.54." *Lawline v. American Bar Ass'n,* 738 F. Supp. 288, 292 (N.D. Ill. 1990), *aff'd,* 956 F.2d 1378 (7th Cir. 1992). Once the Illinois Code of Professional Conduct became law in 1980, governmental agencies became responsible for enforcement of those rules, and it was those agencies and the Illinois law, not the Model Code or Model Rules, that restricted petitioners' conduct. Petitioners acknowledge as much in their complaint, stating:

> The professional conduct of members of the Illinois bar is governed by the Illinois Code of Professional Responsibility, Ill. Rev. Stat. ch. 110A, Art. VIII. Rule 3-103 prohibits lawyers from forming partnerships with non-lawyers if any

> of the activities of the partnership consists of the practice of law. . . . These prescriptions and proscriptions of the Code are administered in general by the defendant members of the ARDC which is constituted by the Supreme Court of Illinois under the Rules of the Supreme Court.

(Complaint, Count I, ¶¶39-40.)

Indeed, petitioners never allege that the model standards had any effect on them before they were adopted as law by the judiciary. On the contrary, they allege that those standards were in effect at the time they organized Lawline, and that they operated undisturbed notwithstanding those standards until they were reported to the ARDC (see Complaint, Count I, ¶¶29, 39, 190-92, 195; Count III, ¶¶176-80). The ARDC, of course, enforced the Illinois Code, not the model standards.

Consequently, petitioners' argument that the model standards restrain competition "of their own force" is unsupported by the law or the factual allegations of their own complaint.

Petitioners argue erroneously that the *Noerr* exemption does not apply to the bar associations' efforts in promoting the Model Rules because those efforts constitute a "boycott" conducted by business competitors (Petition, p. 10). Their argument, however, was expressly rejected in petitioners' cited authority, *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411 (1990) (Petition p. 10). There, the Court held that a boycott by a group of private attorneys who acted as court-appointed counsel in criminal cases in the District of Columbia violated the antitrust laws even though the boycott was aimed at forcing the District to increase their compensation for that work. The Court ruled that the *Noerr* defense did not apply simply because the group's objective was the enactment of favorable legislation. In so holding, the Court specifically distinguished situations like the one at hand where the alleged restraint on trade was

the consequence rather than the result of governmental action. It said:

> But in the *Noerr* case the alleged restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation. . . . In *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.

493 U.S. at 424 (emphasis in original). Here, similarly, the alleged restraint of trade was the consequence of the State's restriction contained in the Illinois Code. Consequently, *Superior Court Trial Lawyers* does not support petitioners' argument.

Petitioners also rely on *Allied Tube* and argue that, like *Allied Tube*, this is a case "where an economically interested party exercises decisionmaking authority in formulating a product standard." (Petition p. 12.) But that similarity is not enough, because *Allied Tube* also limited antitrust liability to "the effect the standard has *of its own force* in the marketplace." *Allied Tube*, 486 U.S. at 510 (emphasis added).

In this case, the Model Code and Model Rules could not have had anticompetitive effects beyond those resulting from the adoption of the Model Code and Model Rules by the Illinois Supreme Court and the Northern District. This critical fact distinguishes this case from *Allied Tube*, where the association's code had practical consequences in the marketplace unrelated to any adoption of that code into state law. Those consequences included that "private certification laboratories, such as Underwriters Laboratories, normally will not list and label an electrical product that does not meet code standards; many underwriters will refuse to insure structures that are not built in conformity with the code; and many electrical inspectors, contractors and distributors will not use a product that falls outside the Code." 486 U.S. at 495-496. No such independent anticompetitive effects are alleged here.

Petitioners also argue that *Noerr* immunity does not apply because the CBA somehow engaged in allegedly anticompetitive acts directed toward other lawyers (Petition, p. 11). This conduct supposedly consisted of participation in the 1983 ABA House of Delegates debate over the Kutek Commission's recommendation to amend Model Rule 5.4 so that it would have allowed multi-professional partnerships and associations. However, petitioners' argument ignores the basic holding in *Noerr* which focuses on the source of the challenged restraints. The alleged anticompetitive actions of the CBA in the ABA House of Delegates occurred after the Illinois Code and Northern District Rules had already been enacted and after the Illinois Supreme Court had preempted the field of attorney regulation. Thus, even if the CBA had voted to change the Model Rules, the participants in the debates were powerless to enforce any new rule because they had no authority to change or enforce the Illinois Code. That power rested solely in the Illinois Supreme Court. Again, the source of the alleged restraint was the Code of Professional Responsibility enacted by the Illinois Supreme Court, and not anything that the CBA did in the ABA House of Delegates.

Because the CBA's actions, the Model Code and the Model Rules had no anticompetitive effects of their own force, the CBA is immune under *Noerr* and *Allied Tube*. The Seventh Circuit's ruling was consistent with those decisions.

b. The CBA's Ethics Opinions Do Not Restrain Trade Of Their Own Force.

Also meritless is petitioners' argument that the drafting and distribution of ethics opinions have no antitrust immunity because they were aimed at other lawyers and have effect through lawyer peer pressure and the ABA's "market power" (Petition pp. 15-16). As just shown, ethics opinions and peer pressure can have no independent effect greater than statutory provisions that carry the force of law. Moreover, petitioners' assertions about the

ABA's "market power" are irrelevant to this respondent, the CBA. In any event, the CBA's 1971 and 1977 ethics opinions (Complaint, Count I, ¶178(c)) were merely advisory. Nowhere is it alleged that the CBA has ever enforced its opinions by way of internal disciplinary proceedings; nor is there any allegation that lawyers are not free to disregard the CBA's opinions. Therefore, those opinions cannot restrain trade of their own force beyond the restraints imposed by law.

Although petitioners acknowledge that the Illinois Supreme Court and the District Court "exercise exclusive power to regulate and discipline attorney conduct" (Petition p. 17), they still argue incorrectly that the ABA's power is sufficient to "dictate the uniform national standard of lawyer conduct embodied in its ethics opinions" and Model Rules, which they claim are the "exclusive source for state rules" (Petition p. 16). They also argue that the federal courts "have traditionally looked to the ABA ethics opinions" as a source of ethical standards (Petition p. 17). But the cases cited by petitioners are not instructive. All involve courts' interpretations of ethical obligations *in the absence* of applicable state or federal rules preempting the field of lawyer regulation (as distinct from this case) or are otherwise irrelevant.[6]

For example, in *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 160 (3d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985), the court looked to the ABA Model Code only after specifically noting that the court itself had adopted no official standards of professional conduct. Similarly, *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 224-25 (1967), was decided before the Illinois Code was adopted; moreover, the majority opinion specifically stated that the views of the Illinois Supreme Court were more relevant in evaluating the propriety of lawyer conduct than were ABA ethics opinions. Thus, the court's opinion under-

[6]Moreover, all of petitioners' cases deal with the ABA's opinions and standards. None suggests that the CBA's ethics opinions or standards restrain trade of their own force.

mines petitioners' argument that the ABA's opinions have independent force after adoption of the Illinois Code. *See also Schniederjon v. Krupa,* 130 Ill. App. 3d 656, 474 N.E.2d 805, 809 (5th Dist. 1985) *app. denied,* 520 N.E.2d 393 (1988) (reviewing contract made before adoption of the Illinois Code); *Corti v. Fleisher,* 93 Ill. App. 3d 517, 417 N.E.2d 764, 774, n. 1 (1st Dist. 1981) (reviewing contract made before adoption of the Illinois Code, and looking to the ABA Code only after reviewing Illinois common-law precedents and finding them insufficient); *In re "Agent Orange" Product Liability Litigation,* 611 F. Supp. 1452, (D.C. N.Y. 1985), *later proceeding,* 800 F.2d 14 (2d Cir. 1988), *rev'd,* 818 F.2d 216 (2d Cir. 1987), *cert. denied,* 484 U.S. 926 (1987) (ABA Code not adopted as state law, but under consideration for adoption, thus explaining the court's reference to it).

In *Strickland v. Washington,* 466 U.S. 668, 688-89 (1984), *reh. denied,* 467 U.S. 1267 (1984), the Court did not rely on any ABA standard or rule, but made only a passing reference to the ABA Standards for Criminal Justice (not in issue here), stating that those standards are "guides" only and not determinative in deciding what level of representation is reasonable for purposes of the Sixth Amendment right to representation. Moreover, the Court there was attempting to discern a national norm; consequently, no one state's rules could be relied upon as dispositive. Thus, the case is distinguishable on several bases. Finally, in *O'Hara v. Ahlgren, Blumenfeld and Kempster,* 127 Ill.2d 333, 537 N.E.2d 730, 735-36 (1989) the only case cited by petitioners in which the court reviewed both the Illinois Code and the ABA model standards, the court looked first to the Illinois Code and decided the case on that basis, turning to ABA opinions only for guidance and additional support.

With respect to any of their cited cases or this case, petitioners cannot seriously contend that a court would apply an advisory ABA or CBA rule or opinion if such rule or opinion were in conflict with the law adopted by the Illinois Supreme Court or

federal court in question. Indeed, the Court stated explicitly in *United Mine Workers*, 389 U.S. at 224-25, that it would not follow an informal opinion of the ABA that conflicted with the stated views of the Illinois Supreme Court.

Petitioners' remaining authorities (Petition, p. 15) lend no support for their position because, unlike the government-imposed restrictions here, they all involve restraints imposed by private entities where parallel state law restrictions were not in place and the state had not preempted the field as it has done here. *See Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), *on remand*, 671 F. Supp. 1465, 1470 (N.D. Ill. 1987), *aff'd*, 895 F.2d 352 (7th Cir. 1990), *cert. denied*, 496 U.S. 927 (1990), and *cert. denied*, 498 U.S. 982 (1990); *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1482-83 (D.C. Cir. 1984); *American Medical Ass'n v. F.T.C.*, 638 F.2d 443, 449-50 (2nd Cir. 1980), *aff'd*, 455 U.S. 676 (1982), *reh. denied*, 456 U.S. 966 (1982); *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298, 301, 303, (E.D. Va. 1977), *vacated*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-90, n. 19 (1975), *reh. denied*, 423 U.S. 886 (1975). In addition, none of those cases involved the *Noerr* defense.

Moreover, in *Surety Title* and *Goldfarb*, the challenged ethics opinions were issued by a state bar association to which all lawyers in the state were required by law to belong as a condition of licensure, and which the legislature had anointed as an administrative agency of the state Supreme Court for the purpose of investigating attorney violations of the Court's rules. *Goldfarb*, 421 U.S. 773, n.2, 776-78, n. 6; *Surety Title*, 431 F. Supp. at 300. That state-sanctioned authority, as the Court specifically noted in *Goldfarb*, 421 U.S. at 778, n. 6, may have engendered influence in the Virginia State Bar that is not present here. As a result, not only were the Virginia State Bar's ethics opinions the only source of authority on the issues in question there, but they were backed

by the State Bar's official authority to investigate deviations from the standards they set forth. Thus, the ethics opinions considered in those cases, unlike the CBA's opinions, had an impact on the plaintiffs "of their own force." *Surety Title* and *Goldfarb* are distinguishable for those additional reasons, and petitioners have cited no pertinent authority removing this case from the *Noerr* defense.

Furthermore, petitioners' allegations of conspiracy (Petition, p. 17) are insufficient to state an antitrust claim and add nothing to their argument. There is no conspiracy exception to the *Noerr* defense. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 399 (1991). In any event, the existence of a conspiracy could not change the fact that the ethics opinions have no effect of their own force.[7] Consequently, *Noerr* immunity applies.

c. The CBA's Alleged Conduct Had No Anticompetitive Effect.

Independently, the dismissal of the complaint was correct because petitioners have failed to allege that the CBA's conduct restrained trade or had any anticompetitive effect. It has long been the law that plaintiffs in antitrust actions must allege and prove that the defendant's conduct adversely affected competition. *See, e.g., Bright v. Moss Ambulance Service, Inc.*, 824 F.2d 819 (10th Cir. 1987) (antitrust laws designed to protect competition, not competitors); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (plaintiff must allege not only injury to itself, but injury to the market as well).

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[7]Moreover, the allegations of conduct by the CBA do not amount to a conspiracy. Petitioners label the CBA a "co-conspirator" based on allegations that some of its members belong to the ABA. However, it is beyond dispute that "[m]ere membership in associations is not enough to establish participation in a conspiracy with members of those associations, much less in a conspiracy between those associations and yet another association." *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

Petitioners have not shown how the opinions and model standards they challenge restrict competition in law practice. Petitioners are only concerned about those rules and laws that prohibit laypersons from possessing ownership interests in business entities engaged in the practice of law. In essence, they are complaining about restrictions on the organizational form in which certain of the petitioners desire to practice law; they are not complaining about any artificial restraints on the supply of lawyers, the manner in which persons practice law or the manner in which lawyers determine the fees they charge for their services. If petitioners had their way, they would substitute one organizational form of practice for another without affecting the availability of persons who can render legal advice. Without allegations of injury to a generalized market, allegations of the substitution of one form of organization for another are insufficient to allege anticompetitive effect. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414 (11th Cir. 1984) (substituting one competitor for another does not violate the antitrust laws, since there is no injury to competition); *Cf. Car Carriers, Inc.*, 745 F.2d at 1107 (generalized injury to competition necessary to state antitrust claim).

In short, none of petitioners' arguments show how the CBA's ethics opinions could restrain trade of their own force, nor how the Seventh Circuit's decision is inconsistent with any ruling of this Court. For these reasons, the Petition must be denied.

2. Independently, Petitioners' Antitrust Claims Against The CBA Are Time-Barred.

The statute of limitations for private claims brought under the Clayton Act is four years. 15 U.S.C. Sec. 15(b). This case was filed on August 19, 1988. The CBA ethics opinions about which petitioners complain (Petition p. 19) were issued in 1971 and 1977, well outside the four-year limitations period. The claims based on them are clearly time-barred.

Further, any alleged conspiracy designed to cause the adoption of the Model Code necessarily ended in 1980, when the Illinois

Code was enacted. Although petitioners argue that the alleged conspiracy against them is "ongoing and continuing" (Petition p. 19), they fail to allege any specific, overt act by the CBA in furtherance of the alleged conspiracy within the limitations period. Consequently, they cannot satisfy the continuing violation exception to the statutory time bar. *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 338 (1971); *Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pennsylvania,* 815 F.2d 270, 278 (3d Cir. 1987), *cert. denied,* 484 U.S. 851 (1987); *Pace Indus., Inc. v. Three Phoenix Co.,* 813 F.2d 234, 237-238 (9th Cir. 1987); *KFC Corp. v. Marion-Kay Co.,* 620 F. Supp. 1160, 1167 (S.D. Ind. 1985).

In *Zenith Radio,* this Court stated the continuing violation rule as follows:

> [E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations *runs from the commission of the act.*

401 U.S. at 338 (emphasis added). Indeed, in each of the cases cited by petitioners, the defendant had committed overt acts in furtherance of the conspiracy within the limitations period. See the cases cited above; *2361 State Corp. v. Sealy, Inc.,* 263 F. Supp. 845, 850-51 (N.D. Ill. 1967) (defendant terminated plaintiff's contract within four years of complaint filing); and *Wilk,* 671 F. Supp. at 1474-77 (complaint was filed in 1976; defendant drafted anticompetitive standard in 1973, sent out anti-chiropractic literature through the date of trial and issued an anti-chiropractic Judicial Council Opinion after complaint was filed, convincing the court that a boycott continued to exist as of that time).[8]

[8] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* (Petition, p. 19), is irrelevant because it dealt with a monopoly, not a conspiracy. Further, *Hanover* involved unusual circumstances, such as the application of various tolling provisions contained in the Clayton Act and the Wartime Tolling Act, as well as the defendant's ongoing refusals to deal with the

(footnote continued on next page)

By contrast, no such overt act by the CBA has been alleged within the limitations period. The most recent "overt act" alleged of the CBA is the promulgation and dissemination in 1977 of the position opposing the unauthorized practice of law. That date is eleven years before this lawsuit was brought and seven years outside the limitations period. No alleged injury to petitioners could have flowed from later statements of that position that did not flow from the first. Where all damages necessarily result from pre-limitations conduct, no new cause of action arises for any subsequent acts within the limitations period because those acts do not injure the petitioners. *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1053 (5th Cir. 1982), *reh'g denied*, 683 F.2d 1373 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *Keystone Resources, Inc. v. American Telephone and Telegraph Co.*, 646 F. Supp. 1355, 1361 (W.D. Pa. 1986), *aff'd without opinion*, 826 F.2d 1056 (3rd Cir. 1987); *Woodbridge Plastics, Inc. v. Borden, Inc.*, 473 F. Supp. 218, 221 (S.D. N.Y. 1979), *aff'd without opinion*, 614 F.2d 1293 (2nd Cir. 1979); *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) and 425 U.S. 971 (1976). There must be a new injury-causing act within the limitations period, not merely continuing injury. *See Keystone*, 646 F. Supp. at 1361; *Naxon Telesign Corp. v. Bunker Ramo Corp.*, 517 F. Supp. 804, 810 (N.D. Ill. 1981), *aff'd in part*, 686 F.2d 1258, 1267 (7th Cir. 1982). The required overt act must be new and independent (not merely a reaffirmation) *and* it must inflict a new and accumulating injury. *Pace*, 813 F.2d at 238. Petitioners allege nothing more than a continuing injury resulting from a discrete, pre-limitations act.

Moreover, petitioners specifically fail to allege any overt, anticompetitive act *by the CBA* within the four-year period before

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plaintiff and its monthly collection of rentals within the statutory period, all of which distinguish it from this case. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F. Supp. 258, 294, n. 15 (M.D. Pa. 1965), *vacated in part*, 377 F.2d 776, 794 (3rd Cir. 1963), *aff'd in part, rev'd in part*, 392 U.S. 481, 502, n. 15 (1968).

petitioners filed their complaint. Petitioners complain of an alleged 1987 ABA ethics opinion and argue that none of the private associations' ethics opinions was ever rescinded (Petition p. 19). But these assertions do not allege an overt act by the CBA within the limitations period. *See Ratino v. Medical Service of Dist. of Columbia (Blue Shield)*, 718 F.2d 1260, 1272 (4th Cir. 1983) (dismissing one defendant because the only actions by that defendant were well before the four-year limitations period).

Further, although petitioners assert that the New (1990) Illinois Code was drafted between 1983 and 1987 by a joint committee which included the CBA and ISBA (Petition p. 20), the provisions of the old Code relating to the unauthorized practice of law are substantively identical in all relevant respects to those contained in the new Illinois Rules of Professional Conduct (Petition pp. 44(b), 45(b)).[9] Consequently, the drafting and proposal of the new rules could not themselves have been a new source of any anticompetitive injury to petitioners.

Finally, because the only source of the restraints on petitioners' conduct is the Illinois Code, the Northern District Rules and their enforcement by the government, and not any alleged conduct of the CBA, none of the CBA's acts could have caused any injury to petitioners after 1982, when the Northern District adopted General Rule 3.54. Therefore, the complaint is time-barred regardless of any ongoing conspiracy. Accordingly, the District Court's holding that petitioners' antitrust allegations were time-barred (which the Seventh Circuit implicitly, though not expressly, affirmed) is not inconsistent with any decision of this Court and serves as an independent basis to deny the Petition.

[9]Petitioners' statement that services such as Lawline "were not prohibited by the Illinois Code of 1980" or the District Court rules adopted in 1982 is wrong (Petition p. 19). There is no discernible difference in the old and new provisions.

D. The Seventh Circuit's Holding That Petitioners' Constitutional Claims Against The CBA Were Properly Dismissed Because Petitioners Have Failed To Allege State Action Under §1983 Was Correct Under This Court's Decisions.

Relying on this Court's decision in *National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 194 (1988), the Seventh Circuit properly affirmed the dismissal of petitioners' claims against the CBA under Section 1983 of the Civil Rights Act of 1871 on the grounds that petitioners had not established that the CBA acted under color of state law. The Court of Appeals rested its decision on the conclusion that:

> [T]he power to prescribe rules governing attorney conduct and to discipline attorneys for violating those rules, rests solely in [the Illinois Supreme Court].

Petition p. 35a (brackets in original) (citation omitted).

Petitioners' constitutional claims against the CBA allege only that the CBA: (1) participated in promulgating the ABA Model Code and Model Rules; (2) issued ethics opinions interpreting the Illinois Code; (3) investigated petitioners' suspected unauthorized practice of law; and (4) considered and commented on the Illinois Code. The glaring deficiency in plaintiffs' Section 1983 allegations is that they fail to allege that the CBA carried a "badge of authority of the state" and represented the state in some capacity. *Tarkanian,* 488 U.S. at 191; *see also Rendell-Baker v. Kohn,* 457 U.S. 830 (1982).

Petitioners have not alleged and cannot in good faith allege that the CBA carried any such badge of authority or otherwise represented the state by its limited involvement in the process which led the Illinois Supreme Court to adopt the model standards. Nor have petitioners alleged that the CBA wore a badge of state authority when it issued ethics opinions. Instead, petitioners argue that the CBA engaged in joint action with state officials

in allegedly drafting the "New Illinois Code" (Petition p. 21) (presumably referring to the 1990 Illinois Rules of Professional Conduct included at Petition, p. 44(b)).

Petitioners' argument ignores the point made in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), *reh. denied,* 434 U.S. 881 (1977), and reiterated in *Tarkanian,* that a private organization does not act under color of state law when it promulgates standards that are subsequently adopted by the state. In *Tarkanian,* the court considered whether the N.C.A.A. acted under color of state law when, with threats of sanctions, it prompted the University of Nevada to remove Jerry Tarkanian from UNLV's basketball program. As a member of the N.C.A.A., UNLV had agreed to abide by its rules and regulations, causing Tarkanian to argue that the school had thereby delegated its functions to the N.C.A.A. and clothed it with state authority. *Tarkanian,* 488 U.S. at 192. The Court disagreed, finding no state action by the N.C.A.A., because it was the State, not the N.C.A.A., that had suspended Tarkanian. *Id.* at 193-195.

Here, as in *Tarkanian,* the final act which allegedly harmed petitioners was committed by the state actor alone. It was the Illinois Supreme Court's decision to adopt as law the Illinois Code of Professional Responsibility that allegedly affected the petitioners' rights. As the *Tarkanian* Court noted in construing *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), which also involved adoption and enforcement of the ABA code, "[i]t does not follow, however, that the ABA's formulation of those disciplinary rules was state action. The state supreme court retained plenary power to reexamine those standards and, if necessary, to reject them and promulgate its own." *Tarkanian,* 488 U.S. at 194. Thus the Illinois Supreme Court's decision to adopt the model standards does not support the conclusion that the defendant bar associations, and particularly the CBA, were acting under color of law when they lobbied for adoption of those standards. *See Tarkanian,* 488 U.S. at 195; *Bates,* 433 U.S. at 361-62.

Similarly, any alleged "joint activity" between the Illinois Supreme Court's Committee on Professional Responsibility and the CBA in drafting the 1990 Illinois Rules "prior to [their] submission to the Illinois Supreme Court" (Petition p. 21) is insufficient to constitute state action, for the same reason. The Illinois Supreme Court had the ultimate and sole authority to accept or reject the draft presented by the alleged "joint actors."[10]

Petitioners attempt to avoid the clear application of *Tarkanian* by arguing that the Illinois Supreme Court established a "procedural scheme" for drafting the proposed 1990 Illinois Rules which "provided no safeguards against misuse by private parties" and which the private associations "misused" to intrude on petitioners' rights, thus creating state action (petition at 21-22). This argument is an untenable effort to distract from the central focus in *Tarkanian*. The issue is not whether the CBA participated in the process, but who made the decision that affected petitioners. Here, that decision was the Illinois Supreme Court's adoption of the Illinois Code.[11]

Moreover, although petitioners argue here that the CBA "misused" the Illinois Supreme Court's "procedural scheme," the complaint contains no factual allegations supporting that argument. Further, they have cited no authority that supports the application of "procedural scheme" analysis here. *U.S. v. Classic,*

[10]Moreover, the proposed new Illinois Rules could not have caused petitioners harm in any event because they were not adopted until 1990, after the occurrence of the events alleged in the Complaint. Further, they are substantively indistinguishable in all relevant respects from the 1980 Illinois Code (see Petition pp. 44b, 44c).

[11]Again, any alleged activity relating to the drafting and adoption of the 1990 rules is irrelevant because the unauthorized practice of law provisions in the proposed 1990 Illinois Rules are substantively identical in all relevant respects to those contained in the old Illinois Code which was already in effect (see Petition pp. 44b, 44c). Consequently, the 1990 Rules and the CBA's alleged participation in drafting them cannot have caused whatever injury petitioners suffered (see previous footnote).

313 U.S. 299 (1941) (petition p. 22) involved the indictment of state election commissioners who were given authority by state statute to count ballots. Their willful alteration and miscounting of the ballots was found to be a misuse of the power given them by the state. Here, by contrast, petitioners have alleged no facts showing that the state conferred any similar authority on the CBA or that the CBA engaged in any such misconduct.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) (petition p. 22), a state statute that gave creditors the right to attach a debtor's property through the court without due process was found to create state action when the creditor on his own put the state process in motion. Here, petitioners have failed to allege the existence of any such law. Thus, neither *Lugar* nor *Classic* supports petitioners' theory of state action.

The allegations contained in the First Amended Complaint, by which petitioners are bound, are insufficient to allege the essential and threshold element of state action needed to make the CBA liable for petitioners' alleged deprivations of constitutional rights. Furthermore, none of petitioners' cases support the theory that lobbying alone can be state action or that the CBA engaged in joint activity or a "procedural scheme" that could convert their activities into state action. The Seventh Circuit's finding of no state action was entirely consistent with this Court's ruling in *Tarkanian*.

CONCLUSION

The Petition should be denied on both procedural and substantive grounds. Procedurally, petitioners failed to comply with Rule 33.7, making the Petition untimely. Further, the case is moot because petitioners suffered no actual injury and the respondents have stipulated they have no intention of prosecuting any disciplinary charges against petitioners in the future.

Substantively, the Seventh Circuit correctly discerned the critical omissions in petitioners' complaint. Petitioners' antitrust claims stated no cause of action against the CBA because the CBA's actions are immune under *Noerr*. Independently, petitioners' complaint alleges no injury to competition, and petitioners' antitrust claims are also time-barred. Petitioners have failed to demonstrate how the Seventh Circuit's ruling on petitioners' antitrust claims conflicts with any decision of this Court.

The Seventh Circuit was also correct under this Court's decision in *Tarkanian* when it affirmed the District Court's dismissal of petitioners' constitutional claim for lack of state action. The state was free to adopt or reject the Model Code and Model Rules as it saw fit. Because the state's choice to enact into law and enforce those standards was the final act that allegedly harmed petitioners, the CBA's activities were not state action.

The Petition establishes no grounds meriting further review by this Court. The courts below did not misapprehend any controlling legal standard. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: October 29, 1993